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No. 86-

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

CONTINENTAL CAN COMPANY,

Petitioner,

v.

ROBERT GAVALIK, *et al.*,*Respondents,*

-and-

CONTINENTAL CAN COMPANY,
a member of The Continental Group, Inc.,*Petitioner,*

v.

ALBERT JAKUB, *et al.*,on behalf of themselves and others similarly situated,
Respondents.

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

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QUESTIONS PRESENTED

1. In enacting section 510 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1140, did Congress intend to prevent an employer from enforcing a provision in a collective bargaining agreement to arbitrate any pension-related differences?

2. When ERISA, 29 U.S.C. §§ 1001 *et seq.*, both preempts state regulation of pensions, 29 U.S.C. § 1144, and sets no statute of limitations for section 510 claims, 29 U.S.C. § 1140, should the Court:

- a) set a uniform federal period of limitations as in *DelCostello v. Teamsters*, 462 U.S. 151 (1983), or
- b) select a uniform federal characterization for the most analogous state period of limitations as in *Wilson v. Garcia*, 471 U.S. 271 (1985), or
- c) apply Pennsylvania State law?

3. In a mixed-motive discrimination case:

- a) Does the Third Circuit's "a determinative factor" test for causation conflict with this Court's "same decision" test in *Mt. Healthy Board of Education v. Doyle*, 429 U.S. 274 (1977)?
- b) Can a defendant employer be denied its entitlement to defeat liability in the class phase of a discrimination case by proving that the same decisions would have been made as to all members of the plaintiff class absent the proscribed factor?

- c) When the plaintiffs at trial limited their claim to layoffs and the district court found that the same employment actions would have occurred in any event due to permissible reasons, did a Third Circuit Panel err when it found that pension avoidance was "a determinative factor", held that a "plan" constituted a *per se* violation of section 510 of ERISA, 29 U.S.C. § 1140, and found that recalls were included within the suit?

THE PARTIES

This statement is submitted pursuant to Rule 28.1 of this Court.

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Continental Can Company, U.S.A., a member of The Continental Group, Inc.¹

¹ The Continental Group, Inc. has been merged into Kiewit Continental Inc. whose parent companies are: Kiewit Holdings Group, Inc., Kiewit U.S. Co., Peter Kiewit Sons' Inc. Subsidiaries (except wholly-owned subsidiaries) and affiliates of KMI Continental are: Altradec AG; Anlage und Handlesgesellschaft mbH; B.V. Handels-Maatschappij v/h Kortman; B.V. Leeuwenbrug; B.V. Metallwarenfabriek Drenthina; B.V. de Vereenigde Blik Fabrieken; bebo Plastik Verwaltungsgesellschaft mbH; bebo-Plastik GmbH & Co. KG; Beleggings-Maatschappij Zaandijk B.V.; Brasflor Comercio E Industria de Subprodutos de Maderia, S.A.; Braskraft S.A. Florestal E Industrial; CCL Industries, Inc.; CWC Leasing, Inc.; Cobelplast (U.K.) Ltd.; N.V. Cobelplast S.A.; N.V. Cobelplast Trading, S.A.; Continental Can Canada, Inc.; Continental Can Company of Europe B.V.; Continental Can European Industries, N.V.; Continental Can Hong Kong, Limited; Continental Can Leasing Company, Inc.; Continental Can Nigeria, Limited; Continental Can Saudi Arabia, Ltd.; Convertidora

(footnote continued)

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**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

Petitioner, Continental Can Company, U.S.A., a member of the Continental Group, Inc., respectfully petitions for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Third Circuit entered in this case on January 15, 1987, and corrected on February 19, 1987.

OPINIONS BELOW

The corrected opinion of the Court of Appeals is reported in *Gavalik v. Continental Can Co.*, 812 F.2d 834 (3d Cir. 1987); the finding of facts, conclusions of law, and the judgment order of the district court dated September 24, 1985, were unpublished. Both opinions appear in petitioner's appendix.

JURISDICTION

This Court has jurisdiction to review the judgment of the court below by writ of *certiorari* pursuant to 28 U.S.C. § 1254(1). The judgment of the Court of Appeals was entered on January 15, 1987, and corrected on February 19, 1987. Petitioner filed a petition for rehearing with a suggestion for rehearing *en banc*. That petition was denied on February 19, 1987. This petition is being filed within 90 days of the denial of the petition for rehearing.

APPLICABLE STATUTES

The Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001 *et seq.* ("ERISA"); in particular § 510 of ERISA, 29 U.S.C. § 1140. The text of 29 U.S.C. §§

1113, 1132, 1133, 1140, and 1144 are included in the appendix along with the text of selected portions of the legislative history.

STATEMENT OF THE CASE

This petition arises from the Third Circuit reversal of a district court decision. The plaintiffs, former employees of defendant's can manufacturing plant in Pennsylvania, alleged that Continental had violated section 510 of ERISA by laying them off before they attained eligibility for so-called Rule of 65 or 70/75 pension benefits.¹ The basis for jurisdiction was section 502 of ERISA, 29 U.S.C. § 1132. The district court held in favor of the defendant and present petitioner, Continental Can Company, U.S.A. ("Continental").

Continental is a corporation engaged throughout the United States in the business, *inter alia*, of manufacturing cans. The certified union representative of the respondents is the United Steelworkers of America, AFL-CIO, Local 4337 (hereinafter referred to as "USW").

Beginning in the early 1970's, the can producing industry as a whole experienced a steady decline in business due principally to competition from new technology in aluminum cans, plastic and paper products, and self-manufacturing in the beverage industry.

As part of the company's management of its business in 1976, Continental developed and began to use a computerized data base, Bell I, that contained employee personnel information, including seniority date, job classification, and age. The company used a computer program called Bell II to measure the labor costs of its operations.

Continental laid employees off at its plant site in West Mifflin, Pennsylvania, in 1977 and 1978, shut down op-

¹ The pensions at issue were provided by Continental in addition to regular retirement pensions for former employees in layoff situations. See *Gavalik* at 5-7 (App. at 8a-10a) for a further explanation of these layoff pension benefits.

eration of the "pail line" in the plant in 1978, and closed the plant in 1981. After being laid off, four of the named plaintiffs filed grievances, but the grievances were not appealed to arbitration.

Laid off employees filed two separate actions in the district court: *Gavalik v. Continental Can Co.*, No. 81-1519 (W.D. Penn. Sept. 8, 1981); and *Jakub v. Continental Can Co.*, No. 82-1995 (W.D. Penn. Sept. 27, 1982). The principal relief sought in these cases was the same as that sought in the above-referenced grievances. The cases were consolidated and a single class action was certified on January 17, 1984.

As one of its affirmative defenses, Continental asserted that as the complaint alleged discriminatory layoffs beginning in 1976, and continuing until the relocation of the pail line in the winter of 1977-78, the plaintiffs' complaint, first brought in September of 1981, was time-barred. As another affirmative defense, Continental asserted that the court lacked jurisdiction because the plaintiffs had failed to exhaust their administrative remedies.

After a non-jury trial, the district court held that employees did not need to exhaust the grievance or arbitration procedures (Conclusion of Law # 3; App. at 91a) and entered judgment for Continental finding that Continental had legitimate business reasons for the layoffs and the plant closings. (Findings of Fact 107 and 142; App. at 86a, 90a). The district court also held in its interlocutory opinion of December 15, 1983, that plaintiffs' claims were subject to Pennsylvania's six-year residuary statute of limitations ("SOL").

The employees appealed. Continental cross-appealed, renewing its claims that the employees' suit was barred by the applicable SOL and/or the employees' failure to exhaust their grievance-arbitration remedies.

A two-judge panel of the Third Circuit denied the cross-appeal and reversed the district court stating that the

burdens of proof had been misallocated; affirmed the district court's finding that a six-year SOL governed; and affirmed the trial court's conclusions that arbitration was not needed. *Gavalik v. Continental Can Company*, Nos. 85-3597 and 85-3615 (3d Cir. February 19, 1987).

The circuit did not remand the case to the trial court for further proceedings consistent with the changed burdens of proof. Rather, the Third Circuit held for the plaintiffs despite the district court's express findings that the closing of the pail line and the layoffs would have occurred in any event. *Gavalik v. Continental Can Co.*, Nos. 81-1519 and 82-1995 (W.D. Pa., September 24, 1985), Slip. Op. (Findings of Fact 107 and 142; App. at 86a, 90a). Under the remand order,² each individual plaintiff carries a presumption of liability in his favor. Continental can only limit damages by proving that the employees would have been laid off absent the proscribed motive.

REASONS FOR GRANTING THE WRIT

The petition asks this Court to address issues that affect literally millions of workers and thousands of employers in the United States.

First, the circuit courts have divided on whether employers can enforce collective bargaining agreement ("CBA") provisions to arbitrate pension disputes when violations of ERISA are alleged. Employers with multiple plant locations can thus face different treatment of identical employee claims based solely upon each plant's geographical location even when all employees are represented under the same CBA—exactly the situation the petitioner has faced.

² By order dated March 20, 1987, the Third Circuit recalled the mandate of remand for 30 days and, once the petition is docketed, until disposition of the case before this Court.

Moreover, despite the federal labor policy favoring *prompt* resolution of disputes, the Third Circuit has adopted a SOL that can result in employers, such as the petitioner in this case, facing claims for damages many years after the events in question and many years after the grievance procedure was abandoned or completed and not appealed by individual workers. Such results can only have a chilling effect on U.S. companies considering whether to provide, continue or expand pension benefits.

Finally, the petition presents the important question of whether an employer can be denied the right, in the liability phase of a mixed-motive discrimination case, to prove through the preponderance of the evidence that the challenged decisions would have occurred absent the proscribed motive. The Third Circuit's denial of such a right to the petitioner not only conflicts with Supreme Court precedent and the precedent of other circuits, but also raises the spectre, if not reversed, of the Third Circuit denying basic due process rights to defendants in the full range of discrimination cases filed in the federal district courts of that circuit. For example, during 1985, 549 civil rights employment cases alone were filed in the U.S. district courts in the Third Circuit. Am. Jur. 2d Desk Book, Item No. 66 (July 1986 Supplement). Exercise of the Supreme Court's supervisory function to assure conformance of the circuits to teachings of this Court and the basic tenets of the Constitution are particularly appropriate in such a situation.

I. THE THIRD CIRCUIT'S DETERMINATION ON THE ARBITRABILITY OF ERISA-BASED CLAIMS IS IN CONFLICT WITH THE DECISIONS OF OTHER CIRCUITS AND THIS COURT.

The Third Circuit's *Gavalik* decision that statutory claims under ERISA are not arbitrable is in direct conflict with the decisions of the Seventh Circuit Court of Appeals in *Dale v. Chicago Tribune Co.*, 797 F.2d. 458, 466-67 (7th

Cir. 1986), *cert. denied*, 107 S. Ct. 954 (1987) and *Kross v. Western Electric Co., Inc.*, 701 F.2d 1238, 1244-45 (7th Cir. 1983), with the decision of the 11th Circuit in *Mason v. Continental Group, Inc.*, 763 F.2d 1219, 1222-1225 (11th Cir. 1985), *cert. denied*, 106 S. Ct. 863 (1986), and with the decision of the 2nd Circuit in *Alfarone v. Bernie Wolff Construction*, 788 F.2d 76, 79 (2d Cir.), *cert. denied*, 107 S. Ct. 316 (1986). However, it is consistent with the Ninth Circuit's decision in *Amaro v. Continental Can Co.*, 724 F.2d 747, 750-52 (1984)³ and the District of Columbia Circuit's decision in *Air Line Pilots Association v. Northwest Airlines, Inc.*, 627 F.2d 272, 278 (D.C. Cir. 1980). (*Alfarone* and *Air Line Pilots Association*, ERISA cases, do not involve section 510.)

In a dissent to this Court's denial of *certiorari* in *Mason*, Justice White (joined by Justice Brennan) discussed the need to grant *certiorari* on the issue of exhaustion in ERISA cases:

I believe that the Court should grant *certiorari* in this case in order to resolve the uncertainty over the existence of an exhaustion requirement in cases of this kind. The increasing significance of ERISA litigation is apparent from the growing number of such cases that appear on our docket; in a field so productive of federal litigation, the need for clear procedural rules governing access to the federal courts is imperative. Moreover, because the coverage of particular ERISA plans frequently extends to beneficiaries in more than

³ The issue of exhaustion has been raised again in the district court based on the Supreme Court's decision in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 105 S. Ct. 3346 (1985), decided subsequent to the 9th Circuit decision. The circuit remanded the action to the district court for further adjudication. The district court denied the defendant's exhaustion argument implicitly and then denied its § 1292(b) motion to have the issue of exhaustion certified. Hence, appeal of the exhaustion claim in the 9th Circuit awaits completion of the trial.

one state—and, no doubt, in more than one judicial circuit—differences in the rules governing access to federal court for the purpose of pressing a claim under ERISA may have the troubling effect of encouraging forum-shopping by plaintiffs.

Mason, 106 S. Ct. at 863.

The problems highlighted by Justice White have worsened since his dissent. Those seeking to avoid the need to pursue arbitration provisions of collective bargaining agreements can attempt to file in the Third or Ninth Circuit even when their actions may have arisen primarily in other circuits (*e.g.*, Seventh and Eleventh). Petitioner is a prime example of such disparity. When it was sued in the Eleventh Circuit, the suit was dismissed for failure to exhaust. *Mason*. Yet, when the same causes were asserted in the Third and Ninth Circuits, a contrary ruling on exhaustion was made. *Gavalik*, *Amaro*. Now Continental is confronted with a nationwide class action in the Third Circuit. See *McLendon v. Continental Group, Inc.*, 602 F. Supp. 1492 (D.N.J. 1985). If this action had been filed in the Seventh or Eleventh circuits, exhaustion would be a bar.

The Third Circuit's *Gavalik* decision also conflicts with a recent decision of this Court and with the statutory intent of Congress in passing the ERISA statute. The Third Circuit has allowed its distrust of arbitration to override the language of the statute, congressional intent, and the principles of federal common labor law.

Until this issue is resolved, an air of uncertainty will surround collective bargaining agreements and the CBA negotiation process. The policy of our federal labor laws, which is "to promote industrial stabilization through the collective bargaining agreement" (*United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 at 578 (1960)), will be at risk.

A. This Court Should Grant Certiorari to Resolve the Conflict among the Circuits.

1. Arbitration Is a Favored Remedy in Disputes Between Management and Labor.

In its "role of developing a meaningful body of law to govern the interpretation and enforcement of collective bargaining agreements" (*Steelworkers v. American Manufacturing Co.*, 363 U.S. 564 at 567 (1960)), this Court has consistently affirmed a basic tenet of federal common labor law: the use of arbitration for the resolution of disputes. As noted in *Steelworkers v. Warrior & Gulf Navigation Co.*, *supra*, 363 U.S. at 580, "[a] collective bargaining agreement is an effort to erect a system of industrial self-government." "[T]he grievance machinery under a collective bargaining agreement is at the very heart of industrial self-government." *Id.* at 581.

One of the controversies that has surrounded arbitration arises from the intersection of the right to arbitrate contract-based claims and the right to judicial enforcement of statutorily-created rights. This Court has held that access to judicial remedies for some rights created by statutes may not be deferred to arbitration.⁴ More recently, how-

⁴ *McKinney v. Missouri-Kansas-Texas R.R. Co.*, 357 U.S. 265, 268-270 (1958) (Universal Military Training Service Act, 50 U.S.C. app. § 459(d)); *U.S. Bulk Carriers, Inc. v. Arguelles*, 400 U.S. 351, 354 (1971) (Seaman's Wage Act, 46 U.S.C. § 596, 597); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44-49 (1974) (Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e)); *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 737 (1981) (Fair Labor Standards Act of 1938), 29 U.S.C. §§ 201-219; *McDonald v. City of West Branch*, 466 U.S. 284 (1984) (Civil Rights Act of 1871, 42 U.S.C. § 1983). These cases are distinguishable from cases involving statutory causes of action to enforce contract-based rights such as those to pensions created under CBAs. It appears that misinterpretation of these cases by failure to note that distinguishing factor has given rise to controversy between the circuits. See discussion *infra*. See also *Schneider Moving & Storage Co. v. Robbins*, 466 U.S. 364, 370-72 and n.14 (1984) (Court did not

ever, in *Mitsubishi* this Court has reaffirmed that the federal policy favoring arbitration, as embodied in the United States Arbitration Act, 9 U.S.C. §§ 1 *et seq.*, is entitled to as much deference as the policies espoused in other federal statutes. The Court articulated a two-step analysis to determine whether statutory rights may be deferred to arbitration. The first step requires the analyzing court to interpret the governing contract to determine whether the parties intended the dispute at issue to be resolved by the arbitration procedures of the agreement. In this step, there is a strong presumption of arbitrability unless the CBA expressly excludes the particular type of dispute at issue from the grievance procedures. *AT&T Technologies v. Communications Workers*, 106 S. Ct. 1415, 1419 (1986); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 584-85 (1960).⁵ The second step requires the court to examine the statute giving rise to the claims at issue and to review its legislative history. The purpose is to determine whether there is an indication that the legislature intended to prevent employers from enforcing CBA provisions for arbitration of pension-related disputes.

By implication, since the policy favoring arbitration under the federal labor statutes (including section 203(d) of the Labor Management Relations Act, 1947, 29 U.S.C. § 173(d)) is as strong as that of the Arbitration Act, the guidance of this Court in *Mitsubishi* should be applied in

reach issue of whether a CBA requirement for arbitration of ERISA claims would be lawful because it held that trustees of employee-benefit funds are not parties to the CBA.)

⁵ The trial court found that the claims of the plaintiffs were not covered by their collective bargaining agreement. Although the finding was cross-appealed, the circuit court did not discuss the issue in its opinion. The arbitration sections of the master agreement appear in the appendix as pages 105a-118a; and those from the pension agreement at 119a-130a. Because no grievance is excluded from the arbitration provisions of the CBA in issue, the trial court's finding is plainly erroneous. *AT&T, Warrior & Gulf Navigation Co.*, *supra*.

the collective bargaining arena.⁶ The attempt to discern the intent of the legislature that created ERISA is the source of controversy among the circuits.

2. The Third and Ninth Circuits Misinterpreted the Legislative History of ERISA; the D.C. Circuit Did Not Consider It.

The Third Circuit in *Gavalik* considered itself bound by *Zipf v. Amerian Telephone and Telegraph Co.*, 799 F.2d 889 (3d Cir. 1986). Although it did not specifically apply the *Mitsubishi* test to discern a legislative intent against arbitrability in *Zipf*, the court, in *Gavalik*, found that "[i]n *Zipf* the approach approved in *Mitsubishi* was not contravened." *Gavalik* at 32.⁷

⁶ The apparent application of *Mitsubishi* to collective bargaining agreements is indicated in the opinion itself when this Court cites a case from the *Steelworkers Trilogy*, *Steelworkers v. Warrior & Gulf Navigation Co.* as an example of an instance when the Court has favored arbitration under the criteria established by the decision. *Mitsubishi*, 105 S.Ct. at 3354.

⁷ The court indicated its basis for this observation:

The *Zipf* Court did not resort to a presumption of unarbitrability, but rather sought to ascertain congressional intent on the question of arbitrability of substantive discrimination claims under § 510 of ERISA. Its examination of the legislative intent of § 510 revealed an express desire that claims brought thereunder be submitted to the courts. "Indeed, an amendment that would have created an administrative remedy for section 510 claims, to be established by the Department of Labor, was defeated." *Zipf*, 799 F.2d at 892.

Gavalik at 32 (emphasis added). Review of the legislative history demonstrates that the defeated amendment was intended to cover those employees who were not protected already by a collective bargaining agreement providing administrative remedies. The amendment was defeated based on its cost, not from any antipathy to administrative and arbitral remedies. 119 Cong. Rec. 30,374-75, 30,399-401 (1973), reprinted in Senate Comm. on Labor and Public Welfare, Subcomm. on Labor, 94th Cong., 2d Sess., Legislative History of the Employee Re-

In its decision in *Amaro*, the Ninth Circuit distinguished its previous finding of an exhaustion requirement for ERISA-based claims, *Amato v. Bernard*, 618 F.2d 559, 567 (9th Cir. 1980), on the grounds that the latter case involved a request for declaration of the parties' rights under a pension plan, whereas in the case before it, the claim did not specifically arise from breach of contract.

The D.C. Circuit in *Air Line Pilots Association* did not review ERISA's legislative history; the court relied on *Alexander* for its finding that the plaintiffs did not need to arbitrate their statutory claims.

3. The Seventh, Eleventh, and Second Circuits Rely on a Consistent Reading of the Statute.

In *Kross* the Seventh Circuit found itself in agreement with the Ninth Circuit's decision in *Amaro*. In that case the court found from its review of the statute that the exhaustion of administrative remedies was a necessary step before action could be taken in federal court.⁸

In *Mason*, the Eleventh Circuit reviewed the pertinent cases from the Ninth Circuit (*Amaro* and *Amato*) and agreed with *Amato* and with the Seventh Circuit (in *Kross*). It commented: "[i]n addition, imposing an exhaustion requirement in the ERISA context appears to be consistent with the intent of Congress that pension plans provide intrafund review procedures." *Mason*, 763 F.2d at 1227.

tirement Income Security Act of 1974 (Comm. Print 1976) [hereinafter cited as Leg. Hist.] Vol. 2, at 1774-76, 1834-37.

⁸

It would certainly be anomalous if the same good reasons that presumably led Congress and the Secretary [of Labor] to require covered plans to provide administrative remedies for aggrieved claimants did not lead the courts to see that those remedies are regularly used.

Kross, 701 F.2d at 1245, quoting from *Amato*, 618 F.2d at 567.

In *Alfarone*, the Second Circuit relied on the “firmly established federal policy favoring exhaustion of administrative remedies in ERISA cases” (788 F.2d at 79) and cited *Kross*.

The question is clear: did Congress in enacting section 510 of ERISA intend to prevent an employer from enforcing a CBA provision for arbitration of pension disputes? The answers of the circuits are in conflict: the Third Circuit, Ninth Circuit and D.C. Circuit have found that Congress did intend to prevent arbitration of ERISA rights; the Seventh, Eleventh, and Second Circuits have found that Congress intended for ERISA disputes to be handled by arbitral forums.

4. The Third, Ninth and D.C. Circuits Are in Conflict with an Accurate Reading of Legislative History and the Decisions of this Court.

The ERISA statute provides access to federal courts under section 502. It makes no reference to arbitration of the claims (including section 510 claims) that may be brought under section 502. There are no anti-waiver provisions in the statute; thus it does not foreclose arbitration in the manner of the Securities Act of 1934 as has been found in *Jacobson v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 797 F.2d 1197, 1201 (3d Cir. 1986). The provision is similar to those in the Clayton Act and RICO under which courts (in *Mitsubishi* and *Jacobson*, respectively) have found statutory claims to be arbitrable.

Indeed, it contains a provision, section 514(d), that indicates that the statute was not meant to overrule any existing U.S. laws:

Nothing in this subchapter [which includes sections 502 and 510 of ERISA] shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States

ERISA became law in 1974, long after the *Steelworkers Trilogy*⁹ had established deference to arbitration as part of the federal common labor law. Thus, it cannot be construed to override the well-established deference to arbitration as a method of dispute resolution under federal labor law. See *Air Line Pilots Association*, 627 F.2d at 276.

Review of ERISA's history makes it clear that the drafters believed that employees operating under a CBA had an efficient dispute resolution mechanism whereas it was employees without such a mechanism that needed the proposed administrative procedures (see 119 Cong. Rec. 30,374-75, 30,399-401 (1973), reprinted in Leg. Hist., *supra*, at 1774-76, 1834-1837). This perception is typified by Senator Hartke's comment:

Senator Hartke: Most collective bargaining agreements protect employees against discharge without cause and provide effective enforcement machinery in arbitration proceedings whose results are enforceable under section 301 of the Labor-Management Relations Act.

Leg. Hist., *supra*, at 1774.

The legislative record demonstrates a bias in favor of arbitration rather than against it and contains a strong indication that the legislators presumed that arbitration procedures under CBAs would be available for the enforcement of rights under ERISA including section 510 rights. Indeed, civil actions are to be regarded as arising " 'in similar fashion to those brought under § 301 of the Labor Management Relations Act of 1947.' H. R. Conf. Rep. No. 93-1280, p. 327 (1974) (emphasis added)." *Metropolitan*

⁹ *Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

Life Insurance Co. v. General Motors Corp., 55 U.S.L.W. 4468, 4470 (U.S. April 6, 1987)

Relying on a narrow and incorrect reading of the legislative history of ERISA, the Third Circuit has foreclosed the use of arbitration in one of the areas under federal common labor law where it has traditionally been used to resolve problems, *i.e.*, in the area of pension rights. Such a reading places the circuit in conflict with this Court's decision in *Mitsubishi*.

5. The Conflict Can Only Be Resolved By this Court.

The Eleventh Circuit, finding that the intent of the legislature in ERISA allowed for arbitral resolution of disputes under the statute, did so in the full knowledge of differences between the Seventh Circuit in *Kross* and the Ninth Circuit in *Amaro*. The Third Circuit, in finding in *Gavalik* that the intent of the legislature was to prevent deferral of disputes to arbitration, did so with the full knowledge that the Seventh Circuit and the Eleventh Circuit had found otherwise.¹⁰ Thus, the circuits are in disagreement with each other, a disagreement which will cause increasing damage to labor-management relations in the workplace. This Court is the only judicial body that can resolve the dispute.

B. Conflict and Confusion Among Lower Courts Calls for Speedy Resolution in Order to Avoid Increased Case-load and Chaos in the Labor-Management Arena.

In 1986, thirty-eight cases involving disputes over ERISA and exhaustion were decided in federal courts. *See* App. at 131a-134a. With the present controversy between circuits, that number threatens to burgeon. Because of the controversy, those participating in ongoing labor-manage-

¹⁰ Although the *Kross* and *Mason* cases are not specifically mentioned in the Third Circuit's opinion in *Gavalik*, the cases were called to the court's attention in Continental's Brief of Appellee-Cross Appellant filed with the court on Feb. 14, 1986.

ment negotiations cannot bargain confidently for the resolution of pension-related disputes by arbitration. Thus, controversy over pension rights/liabilities and the proper method for resolving disputes vitiates the essence of contract-bargained industrial peace. The plain need for resolution of the conflict between the circuits and the importance of a prompt resolution to industrial peace justify granting *certiorari* in this case.

II. THE THIRD CIRCUIT'S APPLICATION OF A SIX-YEAR STATUTE OF LIMITATIONS IS IN CONFLICT WITH THE BASIC TENETS OF FEDERAL LABOR POLICY AND SEVERAL PRIOR DECISIONS OF THIS COURT.

Few areas of the law stand in greater need of firmly defined, easily applied rules than does the subject of periods of limitations.

Chardon v. Fumero Soto, 462 U.S. 650, 667 (1983) (Rehnquist, J., dissenting).

As emphasized by this Court in *United Parcel Service v. Mitchell*, 451 U.S. 56 (1981), and subsequently in *DelCostello v. Teamsters*, 462 U.S. 151, 161 (1983), Justice Rehnquist's observation is nowhere more true than in the context of "those consensual processes that labor law is chiefly designed to promote—the formation of the collective [bargaining] agreement and the private settlement of disputes under it." *DelCostello*, 462 U.S. at 163 (explaining the need for national uniformity in the federal labor law context) (*quoting UAW v. Hoosier Cardinal Corp.*, 383 U.S. 696, 703 (1966)).

The importance of SOL uniformity has been emphasized again in a case concerning racial discrimination claims. *Wilson v. Garcia*, 471 U.S. 271 (1985).

Disputes in the labor arena must also be resolved quickly: "[O]ne of the leading federal policies in this area is the

'relatively rapid resolution of labor disputes.' " *Mitchell*, 451 U.S. 63 (quoting *Hoosier*, 383 U.S. at 707). Thus, this Court rejected such state SOL periods as that for legal malpractice (three to ten years) and that for contracts disputes (six years):

This system, with its heavy emphasis on grievance, arbitration, and the 'law of the shop,' could easily become unworkable if a decision which has given 'meaning and content' to the terms of an agreement, and even affected subsequent modifications of the agreement, could suddenly be called into question as much as six years later.

Mitchell, 451 U.S. at 64.

When it enacted ERISA, Congress preempted state pension laws, 29 U.S.C. § 1144(a). This indicates a congressional intent that there be uniform federal remedies for the enforcement of pension rights. "This provision demonstrates that Congress . . . meant to establish pension plan regulation as exclusively a federal concern." *Alessi v. Raybestos-Manhattan Inc.*, 451 U.S. 504, 523 (1981). See also *Metropolitan Life Insurance Co. v. General Motors Corp.* 55 U.S.L.W. 4468 (U.S. April 6, 1987).

The Third Circuit's decision threatens to permit the very chaos warned of in *Mitchell*. Indeed, subsequent to the denial of their grievances, and without proceeding to arbitration, the petitioner's employees brought suit in federal court, based on section 510 of ERISA, 29 U.S.C. § 1140. As in *DelCostello* and *Mitchell*, they alleged that their employment was wrongfully terminated. As in those two cases the employees sought to avoid the impact of unsuccessful grievances. As in *Wilson*, the claims were based on discrimination.

Because Congress has not expressly provided for limitations periods applicable to enforcement actions in federal court under section 502, the district court and the Third

Circuit decided to apply Pennsylvania's residuary six-year statute to the employees' claims. Thus, an employer's personnel decisions are subject to federal court review as much as six years after the fact. This result is not only irreconcilable with federal labor policy, it is also in direct conflict with the decisions of this Court in *DelCostello*, *Mitchell*, and *Wilson*.

Correction of the circuit's error is all the more important because it implicates a very fast growing area of labor law. As reported by the Pension Benefit Guaranty Corporation (PBGC) in its 1985 Annual Report to Congress, at 1, about 38 million American workers now participate in some 112,000 insured benefit plans under ERISA. Concurrent with ERISA's key role in the labor market, the number of ERISA cases has grown dramatically in the various courts. A substantial number of those cases have involved statute of limitations questions.¹¹ The lack of direct guidance on a limitations period for ERISA-based

¹¹ 29 U.S.C. § 1113 provides that a three- or six-year limitations period applies to actions for violations of §§ 1101-1114 (enacting rules of fiduciary responsibility). ERISA provides no statute of limitations for actions brought pursuant to section 502 of ERISA, 29 U.S.C. § 1132, to remedy violations of other parts of ERISA. *Kuntz v. Reese*, 760 F.2d 926, 936 (9th Cir. 1985), *op. withdrawn & decision vacated*, 785 F.2d 1410 (1986).

In actions under 29 U.S.C. § 1140, the following state statutes of limitations have been applied: state action for termination of employment-2 years, *Corkery v. SuperX Drugs Corp.*, 602 F. Supp. 42 (M.D. Fla. 1985); state contract action-6 years, *Delisi v. United Parcel Serv. Inc.*, 580 F. Supp. 1572 (W.D. Pa. 1984), state period for statutory actions-6 years, *Cowden v. Montgomery County Soc'y for Cancer Control*, 591 F. Supp. 740 (S.D. Ohio 1984); state residuary statute of limitations-6 years, *McLendon*, *supra*.

Some courts, however, have applied ERISA's built-in limitations statute, 29 U.S.C. § 1113, outside the context of a §§ 1101-1114 violation. See, e.g., *Edwards v. Wilkes-Barre Pub. Co. Pension Trust*, 757 F.2d 52 (3d Cir.) (action to compel recalculation of benefits), *cert. denied*, 106 S. Ct. 130 (1985).

claims has resulted in confusion among the courts, considerable opportunity for forum shopping and great uncertainty for private litigants.

Finally, even if the Third Circuit need not follow this Court's teachings in *DelCostello*, *Mitchell*, and *Wilson*, its decision to apply a six-year statute misapplies this Court's traditional instructions (see, e.g., *Holmberg v. Armbrrecht*, 327 U.S. 392, 395 (1946)) for selection of a state statute of limitations. Specifically, under current Pennsylvania law no limitations period longer than two years could be applied. Indeed, *Gavalik* is in direct conflict with the Third Circuit's own precedent explicitly recognizing the changes in the Pennsylvania statute of limitations.

**A. The Gavalik Opinion is Violative of the Principles Es-
poused by this Court in *DelCostello* and *Mitchell*.**

The *Gavalik* Panel correctly identified the criteria for application of the six-month statute of limitations of section 10(b) of the Labor Management Relations Act (LMRA), 29 U.S.C. 160(b) under *DelCostello*, *supra*. In attempting to apply these criteria, however, the Third Circuit panel erroneously found that: a) section 510 actions do not resemble claims charging unfair labor practices, Slip op. at 26 (App. at 26a); b) the instant dispute does not threaten the bargaining relationship, *id.* at 27 (App. at 27a); and c) the desire for uniformity is not a factor because the claims are not asserted under a collective bargaining agreement. *Id.*

**1. The Family Resemblance between Actions under Sec-
tion 510 and a Charge of an Unfair Labor Practice**

As stated by Senator Hartke in the debate on ERISA, the language of section 510 "parallels § 8(a)(3) of the NLRA." 119 Cong. Rec. 30,374 (1973), *reprinted in* Leg. His., *supra*, at 1775. See also *West v. Butler*, 621 F.2d 240, 245 nn.4-5 (6th Cir. 1980). Thus, the Third Circuit's finding that there was no family resemblance between sec-

tion 510 actions and charges of unfair labor practices is facially incorrect.

2. The Need for Rapid Final Resolution of Disputes where the Collective Bargaining Agreement and Private Settlement of Disputes are Implicated

As in *DelCostello* and *Mitchell*, the former employees in the present case have a grievance/arbitration procedure to handle disputes pertaining to, *inter alia*, pension rights. Avoiding arbitration constitutes "a direct challenge to 'the private settlement of disputes under the [collective-bargaining agreement].'" *Mitchell* at 66 (quoting *UAW v. Hoosier Cardinal Corp.*, 383 U.S. at 702). Application of the six-month period of § 10(b) would strike a balance between the interests of employees in redressing grievances and the federal interest in industrial peace:

The 6-month bar of § 10(b) is designed to strengthen and defend the "stability of bargaining relationships." *Machinists v. NLRB*, 362 U.S. 411, 425. The time limitation reflects the balance drawn by Congress, "the expositor of the national interest," *id.*, at 429, between the interest of employees in redressing grievances and "vindicati[ng] [their] statutory rights," *ibid.*, and the "interest in 'industrial peace which it is the overall purpose of the Act to secure.'"

Mitchell, 451 U.S. 68-69 (Stewart, J., concurring) (footnote omitted).

Since pension rights are a negotiated item in many CBAs, all parties benefit from a prompt resolution of disputes over entitlement to pensions and actions alleging discriminatory deprivation of pension benefits.

3. The Need for Uniformity where the Formation of the Collective Bargaining Agreement and the Private Settlement of Disputes under it are Implicated

As this Court stated in *DelCostello*, there is a special need for uniformity where the case involves "those con-

sensual processes that federal labor law is chiefly designed to promote—the formation of the . . . agreement and the private settlement of disputes under it.” *DelCostello* at 162-163.¹² As in *DelCostello*, plaintiffs are attempting to avoid the application of the grievance procedures established by the CBA. *Supra*, Introduction. See also 119 Cong. Rec. 30,374 (1973), reprinted in Leg. Hist., *supra*, at 1774 (CBAs provide enforcement through arbitration against discharge without cause) and 119 Cong. Rec. 30,400-401 (1973), reprinted in Leg. Hist., *supra*, at 1836-37 (union employees’ disputes on discharges handled through arbitration).

Thus, all the factors that led this Court to choose the six-month limitation period in *DelCostello* are present in the instant case. There is a recognized strong family resemblance between the action at issue and unfair labor practice charges. In addition, the instant claim, as did the one in *DelCostello*, strongly implicates collective bargaining and private dispute settlement, thus raising important issues of uniformity and the need for rapid conflict resolution. If state law is applied, similar claims by employees in different states will be subject to drastically different limitations periods. As was the case in *DelCostello*, application of the six-month period would reflect the appropriate balance as perceived by Congress between rapid

¹² Although the circuits have not mechanically limited *DelCostello* to its strict *Vaca-Sipes* context, there is disagreement among the courts as to the reach of *DelCostello* as this Court has recognized in its denial of *certiorari* in *Davis v. UAW*, 106 S. Ct. 1284, (1986) (White J., dissenting) (conflict among the circuits concerning the application of six-month period to actions against the union under the Labor-Management Reporting and Disclosure Act). See also *Adams v. Gould Inc.*, 739 F.2d 858, 867 (3d Cir. 1984), (*DelCostello* not applicable in pension context), *cert. denied*, 469 U.S. 1122 (1985) (White, J., dissenting, with Brennan and Powell, JJ., joining) (the rule adopted by *Gould* “departs from the policy we recently announced in *DelCostello* of having a single statute of limitations for fair representation suits.”).

conflict resolution and the need to offer plaintiffs an adequate remedy.

B. Application of *Wilson*

The Third Circuit's refusal to apply a limitations period similar to that applicable under 42 U.S.C. § 1983 represents an unduly narrow interpretation of *Wilson* and cannot be reconciled with the Third Circuit's own precedent. The district court cited *Knoll v. Springfield Township School Dist.*, 699 F.2d 137, 141 (3d Cir. 1983) ("*Knoll I*"), in an interlocutory order in 1983 and analogized the employment discrimination claims of the employees to federal discrimination actions under 42 U.S.C. § 1983, which were then subject to a 6-year limitations period in Pennsylvania. Prior to the Third Circuit's determination in the present case, *Knoll I* was vacated, 471 U.S. 288 (1985), and federal actions under 42 U.S.C. § 1983 became subject to Pennsylvania's two-year limitations statute. *Wilson*; *Knoll v. Springfield Township School Dist.*, 763 F.2d 584 (3d Cir. 1985) (on remand—applying two-year injury statute instead of six-year residuary period).

Although Congress itself analogized section 510 ERISA claims to discrimination actions, and although resort to the same limitations period as applied to discrimination actions based on race would further both the federal interest in uniformity and the relatively short limitations periods for labor claims required by *DelCostello* and *Mitchell*, *supra*, the Third Circuit nevertheless disavowed the analogy that had been made by the lower court, and, interpreting *Wilson v. Garcia* as relevant only within its strict 42 U.S.C. § 1983 context, rejected the analogy to federal discrimination claims.

1. The Analogy to Federal Discrimination Actions is Compelling.

Section 510 was characterized by Congress as "a remedy for any person fired such as is provided for a person

discriminated against because of sex." 119 Cong. Rec. 30,044 (1973), *reprinted in* Leg. Hist., *supra*, at 1641. Thus, Congress intended section 510 to provide an identical remedy to that existing under § 1983 cases. *See also Crouch v. Mo-Kan Iron Workers Welfare Fund*, 740 F.2d 805, 810 (10th Cir. 1984) (section 510 creates "a claim for retaliatory action by the employer similar to that under the civil rights laws").

2. The Federal Interest in Uniformity

Wilson's identification of a national interest in uniformity was based on the remedial nature of the statute. An analogy to federal discrimination claims, whose limitations period is determined by the state limitations period applicable to personal injury actions would comport with this same federal interest, and would resolve the confusion among the courts as to the period of limitations for § 510 actions. *Supra*, note 11. In addition, such an analogy would subject all discrimination actions, whether based upon race (42 U.S.C. § 1983) or pension (29 U.S.C. § 1140), to the same limitations period and would comport with Congress' intent in enacting section 510.

3. The Need for Short Limitations Periods

Analogy to the two-year limitations period of *Wilson* also comports with the federal interest in the rapid resolution of labor conflicts. *Mitchell; DelCostello*.¹³

¹³ *Wilson*, according to the test articulated in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-7 (1971), applies retroactively to the action in issue. At the time this action was brought there was no precedent upon which the plaintiffs could reasonably have relied to expect that a court would apply a six-year limitations period. Moreover, even if plaintiffs could foresee that the Court would liken their claims to actions under 1983 (which they could not), their action *predates* the Third Circuit's decisions in *Knoll v. Springfield Township School Dist.*, 699 F.2d 137 (1983) and *Perri v. Aytch*, 724 F.2d 362 (1983) establishing a six-year limitations period to § 1983 actions. *See Smith v. City of Pittsburgh*,

C. State Limitations Periods

Even if actions under section 510 are not subject to the statute of limitations provisions identified in *DelCostello* and *Wilson*, the Third Circuit's decision to apply a six-year period is violative of the principles imposed by this court on the selection of limitations periods when no suitable federal alternatives are available and is in conflict with the Third Circuit's own precedent.

The Third Circuit premised its use of a six-year period on the assumption that this is the period applicable to actions for employment discrimination in Pennsylvania. *Gavalik* at 16.¹⁴

There is no specific limitations period in Pennsylvania for actions for employment discrimination. Thus, for SOL purposes, Third Circuit precedent has uniformly analogized discrimination claims to common law actions for tortious interference. *Knoll I*, 699 F.2d at 141 ("We have analogized a claim of employment discrimination brought under the federal Civil Rights Acts, to 'those torts which involve the wrongful interference with another's economic rights or interests.'"), quoting *Skehan v. Board of Trustees*, 590 F.2d 470, 477 (3d Cir. 1978), in turn quoting *Davis v. United States Steel Supply*, 581 F.2d 335, 339 (3d Cir. 1978).¹⁵

764 F.2d 188, 195 (3d Cir. 1985) (applying *Wilson* retroactively to 1983 action where action brought prior to *Knoll* and *Perri*); *Malley-Duff & Associates v. Crown Life Ins. Co.*, 792 F.2d 341, 345 n.10 (3d Cir.), cert. granted, 107 S.Ct. 509 (1986).

¹⁴ The court in *Gavalik* cites only one state court opinion that supports its holding: *Skehan v. Bloomsburg State College*, 503 A.2d 1000 (Pa. Commw. 1986). The applicable SOL was not a matter of dispute in that case.

¹⁵ See also *Mazzanti v. Merck Co.*, 770 F.2d 34, 35 (3d Cir. 1985), citing *Knoll I* (supra) and *Fitzgerald v. Larson*, 741 F.2d 32, 36 (3d Cir. 1984), vacated on other grounds, 472 U.S. 1051 (1985) (action alleging discharge based on political affiliation); *Meyers v. Pennypack*

Pursuant to the revised Pennsylvania SOL, common law actions for tortious interference are now subject to a two-year period. *Home for Crippled Children v. Erie Insurance Exchange*, 130 P.L.J. 480 (Allegheny County Court of Common Pleas 1982), *aff'd mem.*, 329 Pa. Super. 610, 478 A.2d 84 (1984) (discussing at length the effect of the changes in the Pennsylvania statute of limitations); *Bender v. McIlhatten*, 520 A.2d 37 (Pa. Super. Ct. 1987). This state court interpretation of the applicable SOL has been specifically adopted by the Third Circuit. *Mazzanti*, 770 F.2d at 34. Thus, the Third Circuit's analogy in *Gavalik* to a 6-year residual period is erroneous on its face.

III. THE THIRD CIRCUIT'S "A DETERMINATIVE FACTOR" TEST FOR CAUSATION IN MIXED-MOTIVE DISCRIMINATION CASES CONFLICTS WITH THIS COURT'S "SAME DECISION" TEST.

In mixed-motive discrimination cases, this Court has applied a "same decision" test to determine causation. *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977); *Arlington Heights v. Metro Housing Corp.*, 429 U.S. 252 (1977); *East Texas Motor Freight System, Inc. v. Rodriguez*, 431 U.S. 395 (1977).

The test is:

1. The employee must first show that the proscribed factor is a "motivating" or "substantial" factor in the employer's personnel action.

Woods Home Ownership Ass'n, 559 F.2d 894, 904 (3d Cir. 1977).

Statutory discrimination claims in Pennsylvania, another possible analogy, are subject to limitations periods of two years or less. *See, e.g.*, Pa. Stat. Ann. tit. 43, § 336.5 (Purdon 1986 Supp.) (two years for wage discrimination on the basis of sex); Pa. Stat. Ann. tit. 43, § 959(g) (Purdon 1986 Supp.) (complaints alleging discrimination in an employment context must be filed with the Pennsylvania Human Relations Commission within 90 days after the act); Pa. Stat. Ann. tit. 43, § 1101.1505 (Purdon 1986 Supp.) (four-month period for filing of unfair labor practice charge).

2. If the employee carries this burden, the employer may defeat liability by proving by a preponderance of the evidence that it would have reached the same decision even in the absence of the proscribed factor.

As described in *Mt. Healthy* at 287.

In *Gavalik*, after an extensive trial, the district court found permissible and non-permissible motives, but concluded that the same results would have occurred in any event. *Gavalik*, Findings of Fact and Conclusions of Law, FF 106, 107, 141, 142 (Sept. 24, 1985) (App. at 86a, 90a).

The appellate court reversed, believing that the trial court had misapplied the burdens of proof. Slip op. at 53-56 (App. at 52a-54a.) However, rather than remand the case to the district court for reconsideration of the evidence in light of the corrected standard and permitting such supplemental proceedings as might have been warranted, the Third Circuit held that liability had been established. Slip op. at 63 (App. at 60a-61a.)

In so doing, the Third Circuit effectively eliminated petitioner's opportunity to present any defense against the alleged liability. The Third Circuit ignored the findings of fact by the trial judge, ignored the due process requirements of the Constitution, and ignored the *Mt. Healthy* standard clearly articulated by this Court.

The Third Circuit's approach was based on "a determinative factor" test for causation¹⁶ similar to the "in

¹⁶ *Maxfield v. Sinclair Int'l*, 766 F.2d 788, 791 (3d Cir. 1985), cert. denied, 106 S.Ct. 796 (1986) (The plaintiff must prove that age was a determining factor); *Bellissimo v. Westinghouse Elec. Corp.*, 764 F.2d 175, 179 (3d Cir. 1985), cert. denied, 106 S.Ct. 1244 (1986) ("The 'but for' test does not require a plaintiff to prove that the discriminatory reason was 'the' determinative factor, but only that it was 'a' determinative factor."); *Dillon v. Coles*, 746 F.2d 998, 1005 (3d Cir. 1984); *Duffy v. Wheeling Pittsburgh Steel Corp.*, 738 F.2d 1393, 1395 (3d Cir.

part" test for causation expressly rejected by this Court in *Mt. Healthy*.

A. Application of the Third Circuit's "A Determinative Factor" Test in Gavalik Conflicts with Decisions of this Court.

The Third Circuit explained its standard in *Gavalik*: "[s]imilarly, § 510 of ERISA requires no more than proof that the desire to defeat pension liability is a 'determinative factor.'" Slip op. at 54 (App. at 52a). Under the Third Circuit's test, a plaintiff establishes liability by a showing that the alleged proscribed motive is "a determinative" factor even if the defendant proves by a preponderance of the evidence that the "same decision" would have occurred absent the proscribed motive.

The basic error committed by the Third Circuit in *Gavalik* lies in denying the defendant/employer the entitlement to defeat liability to the plaintiff class by proving that the challenged employment actions were caused by legitimate non-discriminatory reasons.

Notwithstanding the trial court's holding of no liability in conformance with this Court's teachings, the Third Circuit held that the plaintiff's evidence *ipso facto* established liability. It did not remand the case to the trial court to afford the defendant its due process right of showing by a preponderance of the evidence that the challenged employment actions would have occurred absent the proscribed motive. *Hazelwood School District v. United States*, 433 U.S. 299 (1977). The Third Circuit apparently recognized that the defendant/employer has a right to prove that legitimate non-discriminatory reasons caused the challenged actions but with its remand order is allowing the defendant/employer only to limit damages to individual

1984), cert. denied, 469 U.S. 1087 (1984); *Lewis v. Univ. of Pittsburgh*, 725 F.2d 910 (3d Cir. 1983), cert. denied, 469 U.S. 892 (1984); *Smithers v. Bailar*, 629 F.2d 892, 898 (3d Cir. 1980).

plaintiffs with such a showing. Slip op. at 68-69 (App. at 65a.) On remand, the plaintiffs are entitled to a presumption of liability.

The Third Circuit's holding in *Gavalik* conflicts with decisions of this Court in which defendants in mixed-motive discrimination cases can refute liability with proof that their challenged action was caused by a legitimate motive or that the same decision would have been made absent the proscribed factor. This test of causation is pervasive in labor and discrimination cases of all kinds.¹⁷ The mixed-motive burden of proof procedure that has been applied by this Court in other types of discrimination cases is equally applicable to allegations of pension discrimination.

B. The Third Circuit Panel Incorrectly Applied the Same Decision Test at the Wrong Stage of the Case.

Both the plaintiffs' and the defendant/employers' showing as to causation must occur before the trier of fact can determine liability *vel non* to the class. See *Teamsters*, 431 U.S. at 361; *Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867, 875 (1984).

¹⁷ Whether based on: a) race, color, or national origin under civil rights statutes, 42 U.S.C. §§ 2000 *et seq.* and 42 U.S.C. §§ 1981 and 1983 (*Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978); *Hazelwood School Dist. v. United States*, 433 U.S. 299 (1977); *Dothard v. Rawlinson*, 433 U.S. 321 (1977); *Teamsters v. United States*, 431 U.S. 324 (1977); *East Texas Motor Freight Sys., Inc.*), b) race under the Fair Housing Act, 42 U.S.C. §§ 3601 *et seq.* (*Arlington Heights v. Metro Hous. Corp.*, 429 U.S. 252 (1977)); c) union activity under the Labor Management Relations Act, 29 U.S.C. §§ 141 *et seq.* (*NLRB v. Transp. Management Corp.*, 462 U.S. 393 (1983); *Wright Line*, 251 NLRB 150 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982)); d) age under the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 *et seq.* (*Pace v. So. Ry. System*, 701 F.2d 1383, 1385-88 (11th Cir. 1983), *cert. denied*, 464 U.S. 1018 (1983)); or e) the Equal Protection Clause of the 14th Amendment to the Constitution of the United States (*Arlington Heights v. Metro Hous. Corp.*, *supra*).

The Third Circuit permits application of the "same decision" test in *Gavalik* only after it has found liability to the class. *Gavalik* at 62, 64 (App. at 59a-60a, 61a.)

The Third Circuit has erred because under the above-cited precedents of this Court, the defendant's burden of proving that the same result would have occurred absent the proscribed motive is an integral part of the liability phase of the case. The Third Circuit itself has previously recognized that this is true.¹⁸

The court's decision even conflicts with the Eleventh Circuit cases upon which it relied at 46 and 47 (App. at 45a-46a), because in those cases, the employer was allowed to refute liability by proving that the same result would have occurred absent the proscribed factor. *Lee v. Russell County Board of Education*, 684 F.2d 769 (11th Cir. 1982); *Bell v. Birmingham Linen Service*, 715 F.2d 1552, 1556-57 (11th Cir. 1983), cert. denied, 467 U.S. 1204 (1984).

The Panel's error can readily be seen by comparing the following two quotes, the first from *Gavalik* and the second from *Lewis v. University of Pittsburgh*:

The district court erred, however, in not recognizing that appellants carried their burden of proof on causation by establishing that Continental's challenged decisions were motivated by both permissible and impermissible factors.

Slip op. at 68.

¹⁸ In *Dillon v. Coles*, 746 F.2d 998 (3d Cir. 1984), the court stated:

Included in the defendant's rebuttal would be evidence that absent discrimination the plaintiff would not have been hired or promoted because of lack of qualifications, curtailment of operations, or similar matters. This burden of production resting on the employer goes to liability, not relief, and is governed by *Burdine*.

Id. at 1004-05.

There may be several determinative factors which lead to any given decision, all of which can be "but for" causes of the challenged action. The ultimate "but for" test, however, subsumes within its determination all such factors.

Lewis, 725 F.2d at 917 n.8 (3d Cir. 1983).

Under *Mt. Healthy* the ultimate "but for" test is, would the "same decision" have occurred absent the proscribed factor? The Third Circuit's decision in *Gavalik* holds that there is class liability based on an impermissible motive regardless of the existence of other legitimate motives and regardless of the district court's findings of fact that the same results would have occurred in any event.

Motive and causation are essential elements of a section 510 violation under ERISA. Assuming *arguendo*, that this Court holds that the Third Circuit's test for causation is permissible, the Third Circuit nevertheless misapplied the test here.

Normally, appellate courts do not consider issues which have neither been presented at trial nor decided by the district court. *Singleton v. Wulff*, 428 U.S. 106, 119 (1976); *Hormel v. Helvering*, 312 U.S. 552, 556 (1941). The Third Circuit has erred in deciding issues concerning a discriminatory "plan" and "recalls" which were not addressed by the district court.

The trial court did not reach a conclusion concerning an alleged discriminatory "plan". *Gavalik*, at 40 (App. 40). Continental argued on appeal that the "plan" was not before the district court. *Gavalik*, at 41 n.34 (App. at 41a). Nevertheless, the circuit court held that the "plan" was violative of section 510 and corrected its opinion on plaintiffs' petition to permit damages for failure to recall. The panel looked only to the allegations contained in the complaint (*id.*) and ignored how the plaintiffs had expressly

waived issued other than layoffs at trial. (record in *Gav-alik*, joint appendix at 418, 469, 470, 766).

The Panel's *de novo* review of the record and its opinion concerning issues not decided below was violative of the appropriate standards of appellate review.

CONCLUSION

For all of the above reasons, this Court should grant a writ of *certiorari* in order to resolve conflicts between the circuits and with the opinions of this Court over 1) the question of whether Congress in enacting ERISA intended to prevent an employer from enforcing a provision in a collective bargaining agreement to arbitrate any pension-related differences, 2) the proper statute of limitations to be applied to claims based on section 502 of ERISA, 29 U.S.C. § 1132, and 3) the right of a mixed-motive discrimination action defendant to defend itself with a preponderance of evidence.

As it has demonstrated throughout the petition, these issues are of great import, affecting the lives of millions of workers and thousands of companies, and because of the extent of inter-circuit controversy, inconsistency with this Court's opinions, and general confusion, may only be resolved by this Honorable Court.

The Continental Can Company strongly urges the Members of the Court to grant a writ of *certiorari* in the present action.

Respectfully submitted,

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APPENDIX



UNITED STATES COURT OF APPEALS
FOR THE THIRD DISTRICT

Nos. 85-3597 and 85-3615

ROBERT GAVALIK, FRANK GRELO, JOSEPH URBAN, ANTHONY
ULYAN, DONALD A. BERGER, RONALD CLARKE, HENRY
FOSTER, GEORGE PATTERSON, JOSEPH KELLERMAN, ROBERT
PAVLIK, PHILLIP FARLEY, THOMAS RILEY, THOMAS WARREN
and FRANCIS HUMENIK

v.

CONTINENTAL CAN COMPANY
(D.C. Civ. No. 81-1519)

ALBERT J. JAKUB, FRED CIPRIANA, JR., ANTHONY J.
BERNARDO, THOMAS A. MULLIGAN, WILLIAM T. TARR,
DONALD W. ROBERTS, ERNEST WIRBECKI and GEORGE W.
STEPANIC on behalf of themselves and others similarly sit-
uated ALFRED BORRELLI, JR., MICHAEL DI IORIO, ANTHONY
FOLINO, THOMAS E. JOHSTON, ROBERT KAPOLKA, JOHN C.
KINCEL, PETER A. RUMAIN, HARRY H. SMITH, MELVIN J.
SMITH, JACK A. STULL and ERNEST B. TADDEO, on behalf
of themselves and others similarly situated

v.

CONTINENTAL CAN COMPANY, a member of Continental
Group, Inc.
(D.C. Civ. No. 82-1995)

ROBERT GAVALIK, *et al.* and ALBERT J. JAKUB, *et al.*,
Appellants in No. 85-3597
CONTINENTAL CAN COMPANY, U.S.A., a member of the
Continental Group, Inc.,
Appellant in No. 85-3615

(D.C. Civ. Nos. 81-1519; 82-1995)

SUR PETITION FOR REHEARING

Present: GIBBONS, *Chief Judge*, SEITZ, ADAMS,* WEIS,
HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, and
MANSMANN, *Circuit Judges*.

The petition for rehearing filed by Continental Can Company in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the Court in banc, the petition for rehearing is denied.

BY THE COURT,

/s/ A LEON HIGGINBOTHAM
Circuit Judge

Dated: February 19, 1987

* Honorable Arlin M. Adams, United States Circuit Judge, was present when this case was heard, but did not participate in the decision.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 85-3597 and 85-3615

ROBERT GAVALIK, FRANK GRELO, JOSEPH URBAN, ANTHONY
ULYAN, DONALD A. BERGER, RONALD CLARKE, HENRY
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CONTINENTAL CAN COMPANY, U.S.A., a member of the
Continental Group, Inc.,
Appellant in No. 85-3615

(D.C. Civ. Nos. 81-1519; 82-1995)

SUR PETITION FOR PANEL REHEARING

Present: ADAMS,* WEIS and HIGGINBOTHAM, *Circuit Judges*.

In light of the corrected opinion filed February 19, 1987, the petition for rehearing filed by Robert Gavalik, in the above-entitled case and submitted to the judges who participated in the decision of this Court is thereby rendered moot.

BY THE COURT,

/s/ A. LEON HIGGINBOTHAM
Circuit Judge

Dated: February 19, 1987

* Honorable Arlin M. Adams, United States Circuit Judge, was present when this case was heard, but did not participate in the decision.

CORRECTED OPINION
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 85-3597 and 85-3615

ROBERT GAVALIK, FRANK GRELO, JOSEPH URBAN, ANTHONY
ULYAN, DONALD A. BERGER, RONALD CLARKE, HENRY
FOSTER, GEORGE PATTERSON, JOSEPH KELLERMAN, ROBERT
PAVLIK, PHILLIP FARLEY, THOMAS RILEY, THOMAS WARREN
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CONTINENTAL CAN COMPANY
(D.C. Civ. No. 81-1519)

ALBERT J. JAKUB, FRED CIPRIANA, JR., ANTHONY J.
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STEPANIC on behalf of themselves and others similarly sit-
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FOLINO, THOMAS E. JOHNSTON, ROBERT KAPOLKA, JOHN C.
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SMITH, JACK A. STULL and ERNEST B. TADDEO, on behalf
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v.

CONTINENTAL CAN COMPANY, a member of Continental
Group, Inc.
(D.C. Civ. No. 82-1995)

ROBERT GAVALIK, *et al.* and ALBERT J. JAKUB, *et al.*,
Appellants in No. 85-3597
CONTINENTAL CAN COMPANY, U.S.A., a member of the
Continental Group, Inc.,
Appellant in No. 85-3615

**On Appeal from the United States District Court for
the Western District of Pennsylvania (D.C. Civ. Nos.
81-1519; 82-1995)**

Argued: June 6, 1986

Before: ADAMS,* WEISS and HIGGINBOTHAM, *Circuit Judges.*
(Filed February 19, 1987)

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* Honorable Arlin M. Adams, United States Circuit Judge, was present when this case was heard, but did not participate in the decision.

OPINION OF THE COURT

A. LEON HIGGINBOTHAM, JR., *Circuit Judge.*

This litigation originated in two separate class actions, *Gavalik, et al. v. Continental Can Co.*, C.A. No. 81-1519, filed September 18, 1981, and *Jakub, et al. v. Continental Can Co.*, C.A. No. 82-1995, filed September 27, 1982, alleging that the institution and implementation of a "liability avoidance" scheme by Continental Can ("Continental") operated to prevent employees from attaining eligibility for employee benefits in violation of § 510 of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1140 (1982).¹ The cases were consolidated on January 17, 1984, and a single class action was certified. The trial of the consolidated action was bifurcated on the issues of liability and damages. The liability phase of the litigation commenced on July 22, 1985, and concluded on August 8, 1985. On September 24, 1985, the district court entered judgment for the defendant, and the plaintiffs appealed to this Court. Continental has cross-appealed asserting that plaintiffs' claims before the district court were barred by the applicable statute of limitations and/or plaintiffs' failure to exhaust their administrative remedies. We reject the contentions of the cross-appeal,

¹ Section 510 provides, in pertinent part:

Interference with protected rights.

It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, . . . or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan

and because we find that the district court misallocated the burdens of proof, we will reverse and remand for proceedings consistent with this opinion.²

I. BACKGROUND FACTS

Continental Can is a corporation principally engaged in the business of manufacturing cans. Appellants and the class they represent³ are former employees of Continental's Pittsburgh plant, which is the focus of this litigation. During the relevant period, appellants were all members of Local 4337 of the United Steelworkers of America, AFL-CIO ("USW"), which was their recognized collective bargaining agent.

In 1977, Continental and the USW negotiated a collective bargaining agreement under which Continental was to provide a comprehensive employee benefit plan. As part of this benefit package, Continental agreed to provide two pension plans for employees who experience a break in continuous service of at least two years.⁴ Under the "70/

² The parties have diligently advanced several positions in support of their various claims, some of which are not discussed in the text of this opinion. We have fully considered all arguments raised but have limited our discussion to those we deem central to our holding in this case.

³ The class certified by the district court consists of:

all Continental employees who did not achieve eligibility for Rule of 65 or 70/75 pension benefits who were determined by Continental to be permanently laid off in 1976, 1977 or 1978 because of Continental's decision to cap the Pittsburgh plant, including but not limited to all employees whose names fall below Francis Conti's on Continental's seniority roster.

Jt. App. at 175.

⁴ Continental's employee benefit plan also provided vision, health, life and disability insurance benefits, supplemental unemployment benefits, and vacation and wage benefits. See Findings of Fact ("FF") 23-27.

75 pension," an employee could qualify for pension benefits before reaching age sixty-two, if s/he either (a) had at least fifteen years of continuous service,⁵ was fifty years of age or older and had combined age and service equal to or more than seventy years; or (b) had at least fifteen years of continuous service and combined age and service equal to or more than seventy-five.⁶ The "Rule of 65" pension⁷ was paid to employees with at least twenty years of continuous service on the last day worked, whose combined age and years of service was equal to sixty-five or more but less than seventy-five. Although the 70/75 pension plan had been in effect since 1971, the Rule of 65 was first formally proposed by the USW during the 1977 negotiations.⁸ Continental's obligation to pay 70/75 and

⁵ Regular continuous service commenced on the day an employee was hired. A break occurred if the employee was absent for more than two years due to (a) layoff, (b) approved leave of absence, (c) physical disability, or (d) permanent plant shutdown where the employee did not elect to receive severance allowance. *See* FF 19.

⁶ Ordinarily, at age sixty-two an employee who had completed ten years of credited service could elect to retire and receive a normal pension. The normal pension consisted of an initial lump sum allowance, covering the first three months of retirement, with subsequent monthly payments based on years of service and job classification. *See* FF 9. The 70/75 pension was equal to the normal pension plus a monthly supplement that continued until the employee became eligible for Social Security.

⁷ This benefit was equal to a normal pension, reduced by the amount of income earned by the employee during layoff. *See* FF 15.

⁸ Although the Rule of 65 pension plan was first formally proposed by the USW in October 1977, Continental bargaining officials knew prior to the commencement of the 1977 negotiations that the USW would demand the Rule of 65 plan. The steel, aluminum and can industries engage in "pattern bargaining," whereby the same terms, benefits and conditions adopted by the USW and any of these industries is usually requested in the other industries. USW had negotiated a Rule of 65 pension plan with the steel industry in April of 1977 and the aluminum industry in May of 1977. Prior to the negotiations with the can industry, Continental was provided with a copy of the steel in-

Rule of 65 benefits under the agreement arose when employees, after attaining the requisite eligibility, experienced at least a two-year break in service as the result of a plant shutdown, involuntary layoff or absence due to physical disability. For the purposes of entitlement to these benefits, years of service included the first two years following a layoff. This method of calculation was known as the "creep." Under the creep, recall of a laid off employee for even one day commenced a new two-year continuous service period. *See* FF 20, 38. Under the 70/75 pension plan, an employee could creep into the necessary age and service requirement. Under the Rule of 65 plan, an employee could creep only into the age requirement. *See* FF 21-22.

In addition to the break-in-service pension benefits, USW and Continental in 1977 negotiated a change in the seniority system. Prior to the negotiations, the Pittsburgh plant had operated under a departmental seniority system.⁹ In April of 1977, Continental officials had initiated meetings with USW officials to discuss the possibility of implementing plant-wide seniority¹⁰ at the Pittsburgh plant. That summer, local union representatives at the Pittsburgh plant met with Continental officials to negotiate the plant-

dustries' agreement from the USW. Although many of the details of the Rule of 65 plan were unavailable, Continental was aware that it involved a twenty-year service requirement and that payments thereunder would be triggered in the event of a plant shutdown or extended involuntary layoff. *See* FF 80-83.

⁹ Under departmental seniority, each department constitutes a separate unit within a plant. An employee's length of service in one department under this system has no bearing on his or her competitive seniority in another department. As a result, under departmental seniority employees with greater seniority could be laid off in one department while employees with fewer years of service were retained in another. *See* FF 71.

¹⁰ Under plant-wide seniority, an employee with greater seniority has work priority over any employee throughout the plant who has less seniority. *See* FF 72.

wide seniority system. USW favored the change over to plant-wide seniority for two reasons: the departmental seniority system had elicited charges of discrimination by the Equal Employment Opportunity Commission (EEOC), and the plant-wide seniority system would provide maximum job security for its most senior employees. See FF 73. Continental favored plant-wide seniority because it would enable the company (1) to retain its most senior and skilled employees; (2) to retain employees with vested 70/75 and Rule of 65 pension benefits; and (3) to lay off junior employees whose benefits had not yet vested. See FF 74. Ultimately, on October 28, 1977, Continental and the local union formally agreed to institute a plant-wide seniority system at the Pittsburgh plant effective November 1, 1977. See FF 112-13, 118, 122.

A. The "Liability Avoidance" Program

In the mid-1970s, Continental began experiencing a steady decline in business. This decline was principally a result of new manufacturing processes that required fewer plants, the increasing use by the can industry of composite materials and aluminum instead of steel to produce cans, and a growing trend among Continental's customers to begin to manufacture their own cans. See FF 31-32. Continental, as part of an effort to control and reduce its anticipated costs in light of its declining business,¹¹ in 1976 devised a "liability avoidance" program.¹² In order to im-

¹¹ In 1972 and again in 1976, Continental created reserve funds to cover its anticipated costs (including employee benefits such as continued insurance coverage, supplemental unemployment benefits and 70/75 pensions) in the event, *inter alia*, of a plant shutdown. The 1972 reserve—the Extra Charge Authorization ("ECA")—consisted of \$231 million at the time of creation. By 1976, however, the ECA had been substantially consumed. The 1976 reserve—the Plant Utilization Program ("PUP")—was established in an amount in excess of \$100 million. See FF 43-45.

¹² Continental so labeled the program in its internal memoranda. See FF 68.

plement effectively this program, Continental developed an intricate system called the Bell System. The concept component of the Bell System, Bell I, had two complementary objectives: to identify Continental's unfunded pension liabilities so as to avoid triggering future vesting by placing employees who had not yet become eligible for break-in-service on layoff, and to retain those employees whose benefits had already vested. *See* FF 53, 59, 68.

Under Bell I, Continental developed a "cap and shrink" program. It defined a "cap" as a workforce reduction designed to reduce unfunded liabilities; a "shrink" was a workforce reduction resulting from market or manufacturing conditions. *See* FF 54. The decision whether to cap a particular plant was made on the basis of a variety of economic factors at the plant, including its potential employee benefits costs. The determination of an actual cap level was based on Continental's assessment of the needed level of production to meet projected sales.¹³ The cap-line limited employment to a specific name on the seniority roster¹⁴ and was effective for five years. Employees below the cap-line, whether then at work or on temporary layoff, were designated as "permanently laid off," and could not be recalled for five years¹⁵ except under extreme circumstances, and then only with prior approval from the high-

¹³ Prior to the institution of the cap program, the employment level was based on projections of the required manpower needed to produce anticipated volumes of Continental products. After the cap program was adopted, the volume of business was tailored to meet the predetermined desired level of employment. *See* FF 60-61.

¹⁴ The cap-line did not determine the actual number of employees working at a given point in time. As employees within the capped workforce died, quit or retired, the number of employees actually on the job decreased. Thus, the cap-line merely divided those employees eligible for work under the liability avoidance program from those designated as permanently laid off. *See* FF 66; Jt. App. 1074; 340-41.

¹⁵ Under the USW contract, employees lost all rights to recall after five years.

est level of Continental's management. *See* FF 54-57. These employees were not informed by Continental that they would not be recalled.

To further effectuate the goals of the Bell System, Bell II instructed plant managers to adjust their business volume to the desired level of employment. In accordance with this plan, plant managers were authorized to shift business to plants that either had low unfunded pension liability or plants that needed the work in order to retain employees with vested 70/75 benefits. *See* FF 61, 63; Jt. App. at 1367. In addition, Bell II produced and employed scattergraphs—computerized charts that listed the age and service of Continental employees at a given time—to identify the unfunded 70/75 and Rule of 65 liabilities and to ascertain when payments under those plans would be triggered. By looking at a scattergraph, a plant manager could determine the number of USW employees whose rights for 70/75 and Rule of 65 benefits had already vested and those whose rights had not yet vested.¹⁶ *See* FF 64.

Finally, in April of 1977, a "liability avoidance tracking system"—the "Red Flag" System—was instituted in order to prevent inadvertent recalls of employees designated as permanently laid off. Red Flag was tied to Continental's payroll system and was designed to generate automatically a red flag report to alert top Continental officials whenever a permanently laid off employee received a pay check either for actual hours worked or vacation. *See* FF 69-70.

¹⁶ The Inter Plan Job Opportunities ("IPJP") potentially complicated the plant managers' determination of which employees were in the vested or non-vested categories. Under the collective bargaining agreement, USW employees laid off from one plant could transfer to another plant where they had preferential hiring rights. Thus, an employee on permanent layoff status at one plant could in fact continue working in another plant. The requirement that an employee permanently laid off not be recalled for five years, however, directly coincided with the five-year limitation on an employee's preferential recall rights under the collective bargaining agreement. *See* FF 67.

B. The Pittsburgh Plant and the Closing of the Pail Line

Like Continental's overall situation, the Pittsburgh plant experienced a significant decline in business in the mid-1970s. As a result, a number of the plant's production lines were closed, and, in 1975, the Pittsburgh plant became a service center, producing parts for other plants, instead of a factory that made and assembled the entire can. Pittsburgh's pail line, which manufactured large gallon steel containers, however, remained in operation. In 1975, the pail line was designated as a separate plant in order to determine its profitability. Despite the separate designation, the Pittsburgh plant and the pail line continued to share a seniority roster. *See* FF 91-93.

Sometime in 1976, the Pittsburgh plant was selected, in part because of its potentially high unfunded liability costs, as a "concept development" plant for implementing Continental's liability avoidance program. *See* FF 62; Jt. App. 1385. In June of 1976, Continental's Executive Vice President and General Manager of Continental Can Company, USA, Donald Bainton, approved a cap for the Pittsburgh plant of 574 USW employees, to be achieved by the end of 1976, and a second cap of 417 USW employees, to be achieved by the end of 1977. Subsequently, in January of 1977, a Continental official indicated that the "ideal cap level" for the Pittsburgh plant, "disregarding volume assumptions and other factors except long range people liability costs," i.e., unfunded pension liabilities, was 392 USW employees as opposed to the previous recommendation of 417 USW employees. *See* Jt. App. 1250. A cap was not set for employees represented by the other two unions at the Pittsburgh plant.

In early 1977, the manager of the pail line recommended moving the operation to a new location in order to increase its profitability. By the summer of 1977, Continental officials had decided to close the pail line. *See* FF 105. This

decision was based in part on Continental's desire to prevent employees from attaining eligibility for 70/75 and Rule of 65 benefits. Continental also considered the pail line's unprofitability at the Pittsburgh location in determining that it should be closed. *See* FF 101-02, 105-07.

In the summer of 1977, Continental informed the USW and the Pittsburgh local union representatives of its decision to close the pail line. During this time Continental was also pursuing an agreement to implement a plant-wide seniority system at the Pittsburgh plant. In exchange for Continental's promise to use its best efforts to retain employees with twenty years or more of service, the local union agreed to plant-wide seniority. Thereafter, a twenty-year cap-line was drawn under the name of Francis Conti. The 417 USW employee cap for 1978 was increased to 472, which included 436 USW employees above Conti or the twenty-year cap-line, and 36 skilled employees below the cap-line. *See* FF 117-122. The pail line was closed after Continental and the union formally agreed to implement plant-wide seniority, resulting in the elimination of one-hundred and eleven jobs. *See* FF 132-133.

II. PROCEDURAL HISTORY

In the proceedings before the district court, the appellants, all of whom were permanently laid off from the Pittsburgh plant between January 1976 and May 1978,¹⁷

¹⁷ As to the lead plaintiffs in the consolidated actions, the district court found that Robert Gavalik was laid off on January 1, 1978, at which time he was forty years old and had nineteen years and seven months of service; Albert Jakub was laid off on December 22, 1977, at which time he was forty-four years old and had nineteen years and seven months of service with Continental. In addition, the district court found age and service at the time of layoff for the following plaintiffs: Francis Humenik, age forty-one, two weeks short of attaining twenty-year service; Thomas Riley, age thirty-nine and sixteen days short of attaining twenty-year service; and Anthony Folino, age forty-four, eighteen years and eight months of service. *See* FF 136-140.

challenged both Continental's adoption and implementation of its liability avoidance program at the Pittsburgh plant and its closure of the pail line at the Pittsburgh plant. The *Gavalik* action alleged, *inter alia*, that the closure of the pail line was designed to prevent class members from achieving eligibility for 70/75 and Rule of 65 pension benefits in violation of § 510 of ERISA. Discovery in *Gavalik* brought to light the liability avoidance program, and the subsequent *Jakub* complaint challenged the adoption and implementation of the overall liability avoidance program as a deliberate effort to manipulate plaintiffs' length of employment in order to deprive them of 70/75 and Rule of 65 pension benefits, all in violation of § 510.

After a bench trial, the district court entered an order granting judgment for Continental. In its accompanying, extensive findings of facts, the court found that Continental's liability avoidance program was adopted and implemented in order to avoid future vesting of break-in-service pension benefits. *See* FF 53, 68. The court further found that the subsequent decision by Continental to cap the Pittsburgh plant, which resulted in the layoff of individual and class plaintiffs, and its decision to close the pail line, were motivated in part by the desire to prevent employees from attaining eligibility for 70/75 and Rule of 65 benefits and in part by the declining business conditions at the Pittsburgh plant. *See* FF 106-07, 141-42. The district court concluded, without explanation, that Continental's actions did not violate § 510 of ERISA. *See* Conclusions of Law ("CL") 4-5.

On appeal, appellants allege that the district court erred in concluding that its own findings of fact did not establish a classwide violation of § 510 of ERISA; that the court erroneously remitted the determination of whether individual class members' layoffs were caused by the liability avoidance program to the liability phase of the bifurcated trial; that, in any event, having found that appellants' layoffs were the consequence of mixed motives, the court

erred in its allocation of the "but for" burden of proof; and that the critical findings of the district court were clearly erroneous. Continental has cross-appealed alleging that appellants' action before the district court was barred (1) by a two-year statute of limitations or, alternatively, a six-month limitations period, and (2) for failure to exhaust grievance and arbitration procedures. We shall address the cross-appeal first.

III. THE CROSS-APPEAL

A. Statute of Limitations

1.

Continental advances several arguments that, it maintains, require application of a shorter period of limitations than applied by the district court. First, Continental argues that subsequent judicial developments require that a two-year statute of limitations be applied to appellants' claims. Alternatively, Continental urges the application of a six-month limitation period pursuant to the Supreme Court's decision in *DelCostello v. International Bhd. of Teamsters*, 462 U.S. 151 (1983).

Section 510 of ERISA, 29 U.S.C. § 1140 (1982), and the applicable enforcement provision, 29 U.S.C. § 1132 (1982), do not provide a specific statute of limitations for actions alleging violations of § 510. Under such circumstances, the appropriate period is determined by reference to the state statute of limitations governing cases most analogous to the cause of action asserted by the plaintiffs. See *Wilson v. Garcia*, 471 U.S. 261, 266-67 & n.12 (1985). The district court determined that appellants' allegation of a § 510 violation was most analogous to a claim of employment discrimination or breach of fiduciary duty, and that on either theory the six-year residuary period of limitations set forth in 42 Pa. Cons. Stat Ann. § 5527(6)

(Purdon 1982) was applicable. Continental does not challenge on appeal the district court's determination that appellants' § 510 action is analogous to an employment discrimination action.¹⁸ Instead, Continental, accepting the district court's determination is correct, argues that the applicable limitation period is nonetheless two years. We reject Continental's contention.

Continental seeks to discredit the district court's determination that a six-year statute of limitations applies to the instant action because it specifically relied on this Court's decision in *Knoll v. Springfield Township School District*, 699 F.2d 137 (3d Cir. 1983), *cert. granted*, 468 U.S. 1204 (1984) ("*Knoll I*"), which was subsequently vacated by the Supreme Court in light of its decision in *Wilson v. Garcia*, 471 U.S. 261 (1985), *see Springfield Township School District v. Knoll*, 471 U.S. 288 (1985) (*per curiam*), and modified by this Court. *See Knoll v. Springfield Township School District*, 763 F.2d 584 (3d Cir. 1985) ("*Knoll II*"). This Court's modification in *Knoll II*, however, did not effect a change in Pennsylvania law, under which state law claims analogous to employment discrimination and wrongful discharge claims are governed by a six-year limitation period. *See, e.g., Skehan v. Bloomsburg State College*, 503 A.2d 1000 (Pa. Commw. 1986) (applying six-year statute of limitations to plaintiff's employment discrimination claim); *see also Ulloa v. City of Philadelphia*, 95 F.R.D. 109, 114 (E.D. Pa. 1982) (collecting cases).

In *Wilson v. Garcia*, the Supreme Court considered the question "whether all § 1983 claims should be characterized in the same way for limitations purposes." 471 U.S.

¹⁸ Continental did argue before the district court that appellants' action was more analogous to an action for intentional interference with contractual relations and therefore was subject to a two-year limitation period. This claim was rejected by the district court. *See Jt. App.* at 171.

at 271. Upon analysis of the legislative history and statutory goals of § 1983, the Court concluded that a uniform time limit for *all* § 1983 actions—regardless of the nature of the precise claim—must be applied in each state. *Id.* at 275. The Court further concluded that § 1983 actions are best characterized as personal injury actions for limitations purposes. *Id.* at 276.

Notwithstanding the *Garcia* Court's repeated references to the particular purposes of § 1983, Continental argues that, in effect, the holding in *Garcia* established that all claims analogous to a charge of employment discrimination must be governed by the state's statute of limitations period for personal injury. We disagree. Indeed, the facts of *Garcia* itself simply belie Continental's contention. In the underlying action in *Garcia*, respondent sought damages for an alleged unlawful arrest and brutality of the arresting officer. In reaching its conclusion that § 1983 actions should be governed by state personal injury limitations periods, the court made no determination that the individual claims themselves were always most closely analogous to personal injury claims. Indeed, the court recognized that "the § 1983 remedy encompasses a broad range of potential tort analogies, from injuries to property to infringements of individual liberty," but concluded that

[t]he unifying theme of the Civil Rights Act of 1871 is reflected in the language of the Fourteenth Amendment that unequivocally recognizes the equal status of every "*person*" subject to the jurisdiction of any of the *several States*. *The Constitution's command is that all "persons" shall be accorded the full privileges of citizenship; no "person" shall be deprived of life, liberty, or property without due process of law or be denied the equal protection of the laws. A violation of that command is an injury to the individual rights of the person.*

Garcia, 471 U.S. at 277 (emphasis in original).¹⁹

On remand and in accordance with *Garcia*, we followed the Supreme Court's "bright-line approach to the problem of determining what statute of limitations should be applied in § 1983 actions," *Knoll II*, 763 F.2d at 585, and held that in Pennsylvania the two-year statute of limitations for personal injury actions must govern all § 1983 actions despite the topical nature of the claim. *Id.* Neither *Garcia* nor this Court's decision in *Knoll II* render the district court's determination that appellant's § 510 action most closely resembles an employment discrimination claim erroneous. Nor do they affect this Court's consistent rulings that employment discrimination or wrongful discharge claims brought under federal law are governed by Pennsylvania's six-year residuary clause. See *Fitzgerald v. Larson*, 741 F.2d 32, 35 (3d Cir. 1984), *vacated*, ___ U.S. ___, 105 S. Ct. 2108 (1985); *Perri v. Aytch*, 724 F.2d 362, 368 (3d Cir. 1983); *Knoll I*, 699 F.2d at 145.²⁰ Cf. *Al-Khazraji*

¹⁹ Moreover, in vacating this Court's decision in *Knoll I*, the Supreme Court remanded the appeal to us in light of its holding in *Garcia* that "all § 1983 claims should be characterized for statute of limitations purposes as actions to recover damages for injuries to the person." *Springfield Township School Dist. v. Knoll*, 471 U.S. 288 (1985) (emphasis added).

²⁰ We recognize that the cases cited for the proposition that federal actions brought in Pennsylvania alleging employment discrimination or wrongful discharge are governed by a six-year limitation period predate the Supreme Court's decision in *Garcia*. We emphasize, however, that *Garcia* did not affect the underlying characterization of "the essential nature of the federal claim within the scheme created by the various state statutes of limitation." *Davis v. United States Steel Supply*, 581 F.2d 335, 337 (3d Cir. 1978), *resubmitted*, 688 F.2d 166 (3d Cir. 1982), *cert. denied*, 460 U.S. 1014 (1983). Rather, *Garcia* held that, regardless of that characterization, for purposes of § 1983, the state limitations period for personal injury claims would govern. See also *Knoll II*, 763 F.2d at 585 ("In *Wilson v. Garcia*, the Court held that even though constitutional claims alleged under § 1983 encompass numerous and diverse topics and subtopics, the state statute of limitations governing

v. Saint Francis College, 784 F.2d 505, 513 (3d Cir.), *cert. granted in part*, 107 S. Ct. 62 (1986) ("*Davis v. United States Steel Supply*, 581 F.2d 335 (3d Cir. 1978), made it absolutely clear that the six-year limitations period for contract actions applied to Section 1981 actions brought to redress employment discrimination.") In sum, *Garcia* and *Knoll II* apply only to discrimination claims under § 1983.²¹

Continental argues that even if *Garcia* is not applicable to appellants' claim, this Court's decision in *Mazzanti v. Merck Co.*, 770 F.2d 34 (3d Cir. 1985) (per curiam) mandates application of a two-year statute of limitations. We find Continental's reasoning flawed and unpersuasive. *Mazzanti* involved a common law diversity action for tortious interference with an employment contract. As is typical

tort actions for the recovery of damages for personal injuries provides the appropriate limitation period.") In effect, *Garcia* renders the initial characterization of a claim under § 1983 unnecessary. *Garcia* cannot be read, however, to eliminate the "settled practice," to which the Supreme Court refers in the course of its opinion, of adopting a local time limitation which governs state actions most analogous to the federal claim when Congress has failed to provide a specific time limitation. *Garcia*, 471 U.S. at 266; *cf. DelCostello v. International Bhd. of Teamsters*, 462 U.S. 151, 171 (1983) ("We stress that our holding today should not be taken as a departure from prior practice in borrowing limitations periods for federal causes of action, [even where] . . . state law fails to provide a perfect analogy.")

²¹ This court's decision in *Goodman v. Lukens Steel Co.*, 777 F.2d 113 (3d Cir. 1985), *cert. granted*, 55 U.S.L.W. 3391 (U.S. Dec. 2, 1986), highlights the limitation of *Garcia*. In *Goodman* we held that § 1981 actions alleging employment discrimination must, like § 1983 actions making the same type of claim, apply the same period of limitations, viz., the two-year personal injury statute. In other words, *Goodman*, like *Garcia*, focused not on the nature of the particular claim, but rather on the historical basis unifying all § 1981 actions. 777 F.2d at 119-120. Moreover, noting the "substantial overlap" in claims brought under §§ 1981 and 1983, the *Goodman* Court concluded that, given the Supreme Court's decision in *Garcia*, application of different limitations periods "where the same claim is brought under § 1981 would lead to a bizarre result." *Id.* at 120.

in tortious interference case, the plaintiff in *Mazzanti* had filed a complaint against Merck & Company, a third party, alleging tortious interference with her employment contract with PHP Graphic Arts Corporation, which resulted in her termination by Graphic.²² *Id.* In considering whether to apply Pennsylvania's two-year statute of limitations or its residual six-year statute to Mazzanti's claim, this Court, relying principally on a Pennsylvania Court of Common Pleas decision, *Home for Crippled Children v. Erie Insurance Exchange*, 130 P.L.J. 480 (Allegheny Cty., 1982), *aff'd mem.*, 329 Pa. Super. 610, 478 A.2d 84 (1984), predicted that the Supreme Court of Pennsylvania would apply the two-year statute. *See Mazzanti*, 770 F.2d at 36. *Home for Crippled Children*, in turn, based its judgment primarily on its determination that the plain language of 42 Pa. Cons. Stat. Ann. § 5524(3) (Purdon 1982) which prescribes a two-year limitation period for "taking, detaining or injuring personal property," encompassed tortious interference, since contract rights—even if intangible—are personal property under Pennsylvania law.

In the course of examining appellant's claim, the *Mazzanti* Court made reference to our prior decision in *Knoll I* and *Fitzgerald*, which applied Pennsylvania's six-year limitations period to plaintiffs' claims of employment discrimination. Noting the effect of *Wilson v. Garcia*, *supra*, on those decisions, the *Mazzanti* Court summarily noted "that *Garcia*, *Knoll [I]* and *Fitzgerald* all confronted the state limitations problem in the context of federal actions with unique federal policy concerns," and concluded that "those cases [are not] controlling in a diversity context." 770 F.2d at 36. Contrary to Continental's contention, we

²² A tortious interference with contract claim may only lie against a third party. *See Wells v. Thomas*, 569 F. Supp. 426, 435 (E.D. Pa. 1983) ("Pennsylvania law does not permit a terminated employee to assert against his or her employer a claim for intentional interference with his [or her] employment relationship; it is not a claim which can be made by the parties to a 'contract' against each other.").

see nothing in *Mazzanti* to suggest that all federal actions for discrimination are now subject to a two-year statute of limitations under Pennsylvania law. *Mazzanti* considered our prior decisions inapposite and therefore inapplicable to its facts not because of the substantive analysis employed to resolve the Pennsylvania limitations issue, but rather because of the unique federal context in which the analyses were made.²³ Thus, *Mazzanti* simply does not mandate a two-year limitations period for appellants' claims.

Appellants note that "most of the cases discussed and relied upon by both parties on the merits are employment discrimination cases under Title VII." Second Brief for Appellants Cross-Appellees at 41. In the course of various rulings, the district court repeatedly likened appellants' claims to an action alleging employment discrimination.²⁴ The gravamen of appellants' complaint, to paraphrase the district court, is that they were singled out for adverse treatment on the basis of their unvested pension eligibility. We do not deem the district court's determination to be in error. Accordingly, we find that the six-year limitation period was properly applied in this case.

2.

In *DelCostello v. International Bhd. of Teamsters*, 462 U.S. 151 (1983), the Supreme Court considered what stat-

²³ The *Mazzanti* court recognized that the implementation of the federal policy concerns that were at issue in *Knoll I* and *Fitzgerald* "has now been resolved by the United States Supreme Court [in *Garcia*] on a premise different from that which we employed in [those cases.]" 770 F.2d at 36. That premise, rejected in *Garcia*, see 471 U.S. at 273-75, was to treat "the particular [§ 1983] claim in suit on an ad hoc basis, focusing on 'the relief sought and the type of injury alleged.'" *Fitzgerald*, 741 F.2d at 35 (quoting *Aitchison v. Raffiani*, 708 F.2d 96, 101 (3d Cir. 1983)).

²⁴ Indeed, the characterization of the nature of appellants' claim is a key element underlying most of the issues in the instant cross-appeal.

ute of limitations should apply to suits alleging that the employer breached a provision of a collective bargaining agreement and that the union breached its duty of fair representation by mishandling the ensuing grievance or arbitration proceedings. The Court concluded that the six-month limitations period of § 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b) (1982), should govern the suit.²⁵ In choosing § 10(b), the Court noted:

In some circumstances . . . state statutes of limitations can be unsatisfactory vehicles for the enforcement of federal law. In those instances, it may be inappro-

²⁵ In the proceedings before the district court, Continental moved for dismissal urging application of the *DelCostello* six-month limitation period. The district court denied the motion, noting that because the *DelCostello* limitation "applied [only] to actions filed after binding arbitration, it is wholly inappropriate to this case." Jt. App. at 171. Our review of the case law in this Circuit, however, reveals no such limitation. See, e.g., *Martin v. Pullman Standard*, 726 F.2d 101 (3d Cir. 1984) (holding that *DelCostello* was applicable but remanding for determination whether statute of limitations was tolled until plaintiff was informed by union that his grievance had been withdrawn); *Scott v. Local 863, Int'l Bhd. of Teamsters*, 725 F.2d 226 (3d Cir. 1984) (applying *DelCostello* where union refused to proceed to arbitration); *Perez v. Dana Corp.*, 718 F.2d 581 (3d Cir. 1983) (applying *DelCostello* to claim that union breached its duty of fair representation by failing to carry his grievance to arbitration).

Indeed, in holding that the six-month limitations period of § 10(b), as opposed to state limitations periods for vacating an arbitration award, was applicable to *DelCostello*'s claims, the Supreme Court observed that

[a]pplication of an arbitration statute seems straightforward enough when a grievance has run its full course, culminating in a formal award by a neutral arbitrator. But the union's breach of duty may consist of a wrongful failure to pursue a grievance to arbitration . . . or a refusal to pursue it through even preliminary stages.

462 U.S. at 166 n.16. Thus, application of the six-month limitations period to situations in which no binding arbitration had occurred was specifically contemplated by the Court. *DelCostello* is nonetheless inapplicable to the instant action. See discussion *infra*.

priate to conclude that Congress would choose to adopt state rules at odds with the purpose or operation of federal substantive law.

462 U.S. at 161. Rather, resort to federal law may be appropriate "when a rule from elsewhere in federal law clearly provides a closer analogy than available state statutes, and when the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial lawmaking . . ." *Id.* at 172.

Three factors were essential to the *DelCostello* Court's determination that the six-month limitations period of § 10(b) of the NLRA should apply to a hybrid § 301/fair representation claim.²⁶ First, the Court noted that the hybrid § 301/fair representation claim "ha[d] no close analogy in ordinary state law," 462 U.S. at 165, but rather bore a "family resemblance" to charges of unfair labor practice under the NLRB. *Id.* at 170. Second, the Court considered the "rapid final resolution of labor disputes," *id.* at 168, essential to the maintenance of industrial peace. Finally, the Court recognized "[t]he need for uniformity" where "those consensual processes that federal labor law is chiefly designed to promote—the formation of the . . . agreement and the private settlement of disputes under it [-are implicated]." *DelCostello*, 462 U.S. at 171 (quoting *United Parcel Serv. v. Mitchell*, 451 U.S. 56, 70 (1981) (Stewart, J. concurring in judgment)).

We do not think the policy considerations that animated the Court's adoption of the six-month limitations period in

²⁶ Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185 (1982), authorizes actions "for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce." 29 U.S.C. § 185(a). The Supreme Court's decisions in *Vaca v. Sipes*, 386 U.S. 171 (1967), and *Hines v. Anchor Motor Freight*, 424 U.S. 554 (1976), gave recognition to a joint cause of action against the employer for breach of contract and the union for breach of duty of fair representation under section 301.

DelCostello are present here. Unlike *DelCostello*, we have held *supra* that the district court's determination that appellants' claims most closely resemble an employment discrimination claim was not in error. In another context, yet on facts similar to those in the instant appeal, Judge Sarokin noted the similarity between § 510 ERISA actions and employment discrimination claims under Title VII:

Just as Title VII does not guarantee employment, section 510 of ERISA does not guarantee pension benefits; similarly, as Title VII prohibits discrimination on the basis of race with respect to such employment, so does section 510 prohibit discrimination with respect to pension benefits on the basis of one's proximity to such benefits.

McLendon v. Continental Group, Inc., 602 F. Supp. 1492, 1503-04 (D.N.J. 1985).²⁷ We think the analogy is appropriate.

Moreover, the *DelCostello* Court emphasized that "federal courts should [not] eschew use of state limitations periods anytime state law fails to provide a *perfect* analogy." 462 U.S. at 171 (emphasis added). The Court recognized that "there is not always an obvious state-law choice for application to a given federal cause of action." *id.* Nevertheless, the Court concluded that "resort to state law remains the norm for borrowing of limitations periods." *Id.* Thus, only if "a rule from elsewhere in federal law *clearly* provides a closer analogy," *id.* at 172 (emphasis added), may we "turn away from state law." *Id.*

Continental suggests that § 10(b) of NLRA provides such an analogy. Examination of the remaining two factors con-

²⁷ The *McLendon* plaintiffs assert claims virtually identical to appellants' claims in the instant action. Namely, they challenge both the Continental Group's 'capping program' and its failure to recall laid off employees as an effort to abort their eligibility for Rule of 65 and 70/75 pension benefits as violative of § 510 of ERISA. See *McLendon*, 602 F. Supp. at 1497.

sidered by the *DelCostello* Court, however, counsels otherwise. There can be no doubt that the "rapid final resolution of labor disputes [is] favored by federal law." 462 U.S. at 168. This Court has recently observed, however, that such speed and finality are most relevant where the disputed issue "is intertwined with the day-to-day relationship between management and labor." *Adams v. Gould Inc.*, 739 F.2d 858, 867 (3d Cir. 1984), *cert. denied*, 469 U.S. 1122 (1985). *Adams* involved in ERISA breach of fiduciary duty claim against trustees of a pension plan. There, we found that the day-to-day working environment was unaffected where the dispute involved pension contributions, and thus the implication of delay in resolving such disputes did not justify application of the shorter limitations period. Similarly, in the instant action, the nature of appellants' claims, albeit serious, is not such that a delay in resolution threatens labor peace. Indeed, although appellants' claims are markedly different from the claim alleged in *Adams*, *see infra*, involving as they do pension plans and eligibility, here, as in *Adams*, "it [is] far more likely that employees will not be aware of their grievance immediately." *Id.* at 867.

Finally, *DelCostello's* concern with uniformity was informed both by the "similarity of the rights asserted" and the "similarity of the considerations relevant to the choice of a limitations period." *DelCostello*, 462 U.S. at 170-71. Continental argues, based on the language of § 8(a)(3) of the NLRA, 29 U.S.C. § 158(a)(3),²⁸ that appellants' ERISA claims bear a "family resemblance" to unfair labor practice

²⁸ Section 8(a)(3) provides:

- (a) It shall be an unfair labor practice for an employer—
- (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.

29 U.S.C. § 158(a)(3) (1982).

claims alleging discrimination on the basis of union membership. Continental has provided this Court with no case law to assist in determining whether there exists a similarity in the rights asserted in § 8(a)(3) NLRB actions and § 510 ERISA actions. Assuming *arguendo*, however, that such similarity exists, we would nevertheless hold *DelCostello's* six-month limitations period inapplicable to this action because satisfaction of the second prong of the uniformity concern—similarity in the policy considerations relevant to the choice of a limitations period—is lacking.

In that regard, *DelCostello* held application of § 10(b) appropriate on its facts, finding that both hybrid § 301/fair representation actions and unfair labor practice claims must be considered in light of “the proper balance between the national interests in stable bargaining relationships and finality of private settlements, and an employee’s interest in setting aside what he views as an unjust settlement under the collective bargaining system.” *Id.* at 171 (quoting *Mitchell*, 451 U.S. at 71 (Stewart, J., concurring in judgment)). As we noted above, the instant dispute, unlike that contemplated in *DelCostello*, does not threaten to destabilize the bargaining relationship in the manner contemplated by *DelCostello* because here the day-to-day relationship between labor and management is not affected. *See supra*. Moreover, and more important, the desirability of a uniform national limitations period exists where the claims asserted arise under a collective bargaining agreement. Under these circumstances, uniformity operates to preserve “the grievance machinery under a collective bargaining agreement [that] is at the very heart of the system of industrial self-government.” 462 U.S. at 168 (quoting *Mitchell*, 451 U.S. at 63).

In the instant action, Section 7.1(a) of the Pension Agreement between the USW and Continental provides:

If, during the term of this Agreement, any differences shall arise between the Company and any Employee

who shall be an applicant for a lump sum retirement allowance, pension or deferred benefit as provided in this Agreement, as to whether or not such Employee is entitled to or as to the amount of such lump sum retirement allowance, pension or deferred benefit, such differences . . . may be taken up as a grievance . . .

Jt. App. at 1930. In ruling on Continental's motion to dismiss for failure to exhaust grievance procedures, the district court had occasion to consider the nature of appellants' claim and whether that claim was covered under the Pension Agreement. The court stated: "[W]e do not believe that the plaintiffs' claim falls within the terms of the [Pension Agreement] . . . since they are . . . neither applicants for a pension nor in dispute with the defendant as to whether or not they are entitled to a pension. The plaintiffs' claim is not that they have been denied their pensions, but that they have been denied the opportunity to eventually become entitled to a pension." Jt. App. at 165. We agree with the district court's characterization of appellants' claims and its conclusion that such claims are not encompassed under the terms of the Pension Agreement. Cf. *Amaro v. Continental Can Co.*, 724 F.2d 747, 749 (9th Cir. 1984) ("This statutory claim [under § 510 of ERISA] is not for benefits under a collective bargaining agreement. The employees, in fact, are not yet eligible for those benefits.") Thus, appellants' § 510 discrimination claim does not implicate the concerns that persuaded the *DelCostello* Court to apply § 10(b) to hybrid § 301/fair representation claims.

In sum, *DelCostello* does not mandate application of the six-month limitation period of § 10(b) of the NLRB in this case where (1) an adequate state analogy exists and affords a limitations period that does not frustrate national policy, (2) the policies underlying adoption of the six-month limitations period are not present, and (3) no alternative federal limitations period has been suggested to this Court.

Accordingly, *DelCostello* is inapplicable and Pennsylvania law governs.

B. Exhaustion of Remedies

Subsequent to oral argument in this case, another panel of this Court held that "an employee with a claim under Section 510 of ERISA need not submit that claim to the plan before seeking relief in a federal district court." *Zipf v. American Telephone and Telegraph Co.*, ("AT&T"), 799 F.2d 889, 893 (3d Cir. 1986). *Zipf* clearly controls the resolution of Continental's exhaustion claim.

In *Zipf*, appellant suffered from rheumatoid arthritis which caused her to take a disability leave of absence from her employment. After *Zipf* returned to full-time status, she continued occasionally to miss work due to her illness. Eventually, her condition worsened and she began another period of disability leave. On the seventh day of absence *Zipf* was informed by her supervisor of the company's decision to terminate her because of her "'excessive absenteeism.'" *Zipf*, 799 F.2d at 890. *Zipf* filed suit alleging that the decision to terminate was made in violation of § 510 of ERISA to prevent her from potentially qualifying for substantial benefits for which she would have become eligible on her eighth day of absence from work. Summary judgment was entered for AT&T and *Zipf*'s suit was dismissed for failure to exhaust internal administrative remedies.

Upon review, this Court identified two distinct exhaustion issues: (1) whether before seeking judicial relief on a § 510 claim, a claimant is required to submit that claim to the plan and (2) "whether [a § 510 claimant], before seeking judicial relief . . . , must submit to the plan the question of whether [s/he] would have been eligible for benefits had [s/he] not been discharged." 799 F.2d at 891. Proceeding to examine the law of this Circuit, the *Zipf* Court found our prior decision in *Wolf v. National Shopmen*, 728 F.2d 182 (3d Cir. 1984), inapplicable to actions

"brought not to enforce the terms of a plan, but to assert rights granted by the federal statute." *Zipf*, 799 F.2d at 891. This Court then rejected the argument, also advanced in the instant appeal, *see* Reply Brief of Cross-Appellant at 21-24,²⁹ that ERISA contains an implied exhaustion requirement even as to substantive rights conferred under the statute. Examining the legislative history of the Act, we concluded that "the remedy for Section 510 discrimination was intended to be provided by the courts." *Zipf*, 799 F.2d at 892. Finally, *Zipf* recognized the strong national policy favoring arbitration and the traditional practice of the courts to defer to administrative expertise. Relying on this Court's decision in *Barrowclough v. Kidder, Peabody & Co., Inc.*, 752 F.2d 923 (3d Cir. 1985), the *Zipf* Court concluded that these considerations supported the balance struck in *Barrowclough*, to wit:

the most reasonable accommodation is to hold that claims to establish or enforce rights to benefits under 29 U.S.C. § 1132(a) that are independent of claims based on violations of the substantive provisions of ERISA are subject to arbitration, . . . while claims of statutory violations can be brought in a federal court notwithstanding an agreement to arbitrate.

Zipf, 799 F.2d at 892 (quoting *Barrowclough*) (citations omitted).

Standing alone, *Zipf* ineluctably leads to the conclusion that appellants were not required to exhaust arbitral rem-

²⁹ Indeed, Continental's argument goes further. Continental maintains that "ERISA requires that there be internal review procedures to handle claims under the pension plan." Reply Brief of Cross-Appellant at 21 (emphasis in original). Continental fails to distinguish between contractual rights protected under the Act and substantive rights conferred by the Act. *See DelGrosso v. Spang & Co.*, 769 F.2d 928 (3d Cir. 1985), *cert. denied*, ___ U.S. ___, 106 S. Ct. 2246 (1986) (interpreting *Barrowclough v. Kidder, Peabody & Co., Inc.*, 752 F.2d 923 (3d Cir. 1985)).

edies. Continental argues, however, that *Zipf* must be read in light of our prior decision in *Jacobson v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 797 F.2d 1197 (3d Cir. 1986). Indeed, Continental contends that "attempted application of the principles articulated in *Zipf*," would put this Court at odds with recent Supreme Court precedent and create a direct conflict with *Jacobson*. Letter of Eugene L. Stewart, Attorney for Continental Can at 3 (Sept. 10, 1986). Rather than apply, *Zipf*, Continental urges that "[t]he correct approach to the exhaustion issue has been articulated by the . . . Supreme Court in *Mitsubishi* [*Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, —U.S. —, 105 S. Ct. 3346 (1985),] and followed by this court in *Jacobson*." *Id.* at 5. Continental's argument does not alter the result.³⁰

In *Mitsubishi*, the Supreme Court rejected the claim that an "arbitration clause must specifically mention the statute giving rise to the claims that a party to the clause seeks to arbitrate." 105 S. Ct. at 3353. Thus, no presumption against arbitrability arises when the right involved is statutory as opposed to contractual. The proper approach in considering issues of arbitrability, the Court instructed, is two-fold: First, the court must determine whether the parties' agreement to arbitrate encompasses the statutory issues, and second, if so, "whether legal constraints external to the parties' agreement foreclose[] the arbitration of those claims." *Id.* at 3355.

³⁰ Continental points to Judge Adam's separate opinion in *Jacobson* for the proposition that *Zipf's* reliance on *Barrowclough*, in light of *Mitsubishi*, cannot be sustained. See Letter of Eugene Stewart at 2-4 (Sept. 10, 1986). In *Jacobson*, Judge Adams stated: "*Mitsubishi* spurned the basis proffered for this Court's decision in *Barrowclough*, stating that 'we find no warrant in the Arbitration Act for implying in every contract within its ken a presumption against arbitration of statutory claims.'" *Jacobson*, 797 F.2d at 1209 (Adams, J. concurring in part, dissenting in part) (citations omitted). The issue of *Barrowclough's* continued vitality, of course, is not before this Court. *Mitsubishi's* rejection of a rule of nonarbitrability of statutory claims, however, does not undercut the independent interpretation of Section 510 in *Zipf*.

In *Zipf* the approach approved in *Mitsubishi* was not contravened. The *Zipf* Court did not resort to a presumption of unarbitrability, but rather sought to ascertain Congressional intent on the question of the arbitrability of substantive discrimination claims under § 510 of ERISA. Its examination of the legislative intent of § 510 revealed an express desire that claims brought thereunder be submitted to the courts. "Indeed, an amendment that would have created an administrative remedy for Section 510 claims, to be established by the Department of Labor, was defeated." *Zipf*, 799 F.2d at 892. *Jacobson*, which held that determining arbitrability of federal statutory claims is, after *Mitsubishi*, "a matter of statutory interpretation" and may not be determined "on the basis of some judicially recognized public policy," *Jacobson*, 797 F.2d at 1202, is thus fully consistent with the reasoning and holding in *Zipf*.

IV. THE APPEAL

We now proceed to the merits of appellants' claims. Our standard of review of issues involving the interpretation and application of legal precepts is plenary. *United States v. Adams*, 759 F.2d 1099, 1106 (3d Cir.), *cert.denied*, — U.S. —, 106 S. Ct. 275, 336 (1985). The trial court's findings of fact are governed by the clearly erroneous standard of review, *Anderson v. City of Bessemer City*, 470 U.S. 564, 573 (1985), "but as to the legal component of its conclusion, this court has plenary review." *United States v. Felton*, 753 F.2d 276, 278 (3d Cir. 1985).

Appellants' contentions may be summarized as follows: (1) the district court erred in its conclusion that a classwide violation of ERISA had not been established; (2) the district court erred in requiring appellants to prove during the liability proceedings that their layoffs were caused by Continental's liability avoidance program, and by depriving appellants of a rebuttable presumption on causation; (3)

assuming *arguendo* that causation was properly at issue during the liability phase and that the burden of proof on that issue lay with appellants, they carried their burden by establishing that Continental's critical decisions were motivated both by permissible and impermissible factors, and the district court erred thereafter in placing the additional burden on the appellants to prove that, "but for" Continental's consideration of impermissible factors, they would have retained their jobs; and (4) finally, appellants independently argue the the critical factual findings of the district court were clearly erroneous.

These claims require us to consider complex questions concerning both the elements of proof of a § 510 ERISA discrimination claim and the allocation of the burdens of proof on trial of such claim. Any analysis of these issues must begin with an understanding of the nature of the claims asserted by the appellant class and the purposes of the statute under which these claims are brought.

A.

Section 510 of ERISA prohibits employer conduct taken against an employee who participates in a pension benefit plan for "the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan." 29 U.S.C. § 1140 (1982). Congress enacted § 510 primarily to prevent "unscrupulous employers from discharging or harassing their employees in order to keep them from obtaining vested pension rights."³¹ *West*

³¹ Section 510 represents but one provision designed to ensure pension security for the working class. Referring to the overall goals of the ERISA legislation, Senator Javits noted:

Mr. President, a pension-reform law is now a reality because of the hardship, deprivation and inequity suffered by American working people. It is their collective anger and disgust that put tremendous congressional majorities behind [this legislation], and if we who espoused their cause in this body have sometimes not

v. Butler, 621 F.2d 240, 245 (6th Cir. 1980); see also *Zipf v. American Telephone & Telegraph Co.*, 799 F.2d at 889, 891 (1986) (citing *Butler*); *Donahue v. Custom Management Corp.*, 634 F. Supp. 1190, 1197 (W.D. Pa. 1986) (quoting *Butler*). To recover under § 510, a plaintiff need not prove that "the sole reason for his [or her] termination was to interfere with pension rights." *Titsch v. Reliance Group, Inc.*, 548 F. Supp. 983, 985 (S.D.N.Y. 1982), *aff'd*, 742 F.2d 1441 (2d Cir. 1983) (emphasis in original). A plaintiff must, however, demonstrate that the defendant had the "'specific intent' to violate ERISA." *Watkinson v. Great Atlantic & Pacific Tea Co., Inc.*, 585 F. Supp. 879, 883 (E.D.Pa. 1984) (quoting *Titsch*, *supra*). Proof of incidental loss of benefits as a result of a termination will not constitute a violation of § 510. See *Titsch*, 548 F. Supp. at 985 ("No ERISA cause of action [under § 510] lies where the loss of . . . benefits [i]s a mere consequence of, but not a motivating factor behind, a termination of employment.").

Under the prevailing case law, and in accordance with the statutory language, the essential element of proof under § 510 is specific intent to engage in proscribed activity. Proof of specific intent to interfere with the attainment of pension eligibility, then, "regardless of whether the interference is successful and regardless of whether the par-

behaved in as gentlemanly a manner as is customary—and I hope those aberrations of conduct have been rare—it is because we too shared their sense of indignation and frustration over what often seemed to be a cynical disregard of fundamental American concepts of fairness and decency by some of those who managed the private pension funds.

The agony of years of frustrated and disappointed beneficiaries has now come to an end. The discipline of law will enable this and succeeding generations of workers to face their retirement period with greater confidence and greater security. . . .

3 *Legislative History of the Employee Retirement Income and Security Act of 1974*, at 4751 (1976) (remarks of Senator Javits).

ticipant would actually have received the benefits absent the interference," *Zipf*, 799 F.2d at 893, will ordinarily constitute a violation of § 510 of ERISA.³² In most cases, however, specific intent to discriminate will not be demonstrated by "smoking gun" evidence. As a result, the evidentiary burden in discrimination cases may also be satisfied by the introduction of circumstantial evidence. See *Maxfield v. Sinclair Int'l*, 766 F.2d 788, 791 (3d Cir. 1985) cert. denied, ___ U.S. ___, 106 S. Ct. 796 (1986) (age discrimination). In the latter circumstance courts have developed "formula[s] . . . that enable[] the trial judge to sift through the evidence in an orderly fashion to determine the ultimate question in the case—did the defendant intentionally discriminate against the plaintiff[s]." *Dillon v. Coles*, 746 F.2d 998, 1003 (3d Cir. 1984).

B.

As in the context of employment discrimination claims under Title VII, employees alleging discrimination under ERISA bear the burden of making out a *prima facie* case of discrimination. See *McDonnell Douglas Corp. v. Green*,

³² *Zipf's* construction of § 510 is supported by the legislative history which envisions preventive, as well as corrective, purposes of the provision. See S. Rep. No. 127, 93rd Cong., 1st Sess. 35 (1973), reprinted in *1 Legislative History of the Employee Retirement Income and Security Act of 1974*, at 621 (1976) ("The enforcement provisions have been designed specifically to provide . . . participants and beneficiaries with broad remedies for redressing or preventing violations [of ERISA]"); *id.* at 622 ("the committee has concluded that safeguards are required to preclude this type of abuse from being carried out"); see also *3 Legislative History of the Employee Retirement Income and Security Act of 1974*, at 4745 (1976) ("a further protection for employees is the prohibition against discharge, or other discriminatory conduct toward participants and beneficiaries which is designed to interfere with attainment of vested benefits") (Senate floor debate on conference report on H. R. 2). Continental does not contest this construction; rather it maintains that "the district court's holding is in accordance with *Zipf*." Letter of James D. Morton at 2 (Sept. 11, 1986).

411 U.S. 792, 802 (1973); see also *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253-54 (1981) (refining *McDonnell Douglas*). To establish a *prima facie* case under ERISA § 510, an employee must demonstrate (1) prohibited employer conduct (2) taken for the purpose of interfering (3) with the attainment of any right to which the employee may become entitled. 29 U.S.C. § 1140 (1982). In a class action context, it is not enough for the class representative to prove the validity only of his or her own claim. See *General Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 158 (1982). Rather, the class representative "must establish that discrimination was the employer's standard practice." *Dillon*, 746 F.2d at 1004; see also *Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867, 876 (1984) (class representative must establish that (discrimination was the company's standard operating procedure') (quoting *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 336 (1977)). The burden of persuasion on the ultimate issue of intentional discrimination "remains at all times with the plaintiff." *Burdine*, 450 U.S. at 253.³³

³³ At least two circuits have held that the *Burdine* allocation of proof by which the ultimate burden of persuasion remains at all times with the plaintiff is inapplicable in a class action context. See *Taylor v. Teletype Corp.*, 648 F.2d 1129, 1137 n.18 (8th Cir.), cert. denied, 454 U.S. 969 (1981) (*Burdine* does not affect a case of classwide discrimination where the evidence exposes the employer as "a proven wrong-doer" and creates a presumption—"unless the employer proves otherwise—that any class member was a victim of that policy"); *Vuyanich v. Republic Nat'l Bank*, 521 F. Supp. 656, 661 (N.D. Tex. 1981) ("*Burdine* is limited by the factual context in which it was decided.") vacated on other grounds, 723 F.2d 1195 (5th Cir. 1984); cf. *Johnson v. Uncle Ben's*, 657 F.2d 750 (5th Cir. 1981), cert. denied, 459 U.S. 967 (1982) (*Burdine* allocation of proof inapplicable in Title VII disparate impact cases). In each of these cases, the plaintiffs had raised challenges to employment practices based on their discriminatory impact. In deciding that *Burdine*, which was an individual disparate treatment case, did not apply to the claims before them, those courts found significant the absence of an intent requirement in impact cases. The instant action is distinguishable in that proof of specific intent to dis-

If the class establishes a *prima facie* case by a preponderance of the evidence, the burden of production shifts to the employer to introduce admissible evidence of a legitimate, nondiscriminatory reason for its challenged actions. See *Burdine*, 450 U.S. at 254; *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 360 & n.46 (1977); *Dillon*, 746 F.2d at 1004. If the employer fails to rebut the presumption of discrimination that arises from the class's *prima facie* case, the district court must enter judgment for the class. See *Teamsters*, 431 U.S. at 361. If, however, the employer carries its burden of production, the presumption drops from the case and the class representative is afforded the opportunity to demonstrate that the employer's articulated reason is pretextual "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Burdine*, 450 U.S. at 256; *Bellissimo v. Westinghouse Elec. Corp.*, 764 F.2d 175, 179-80 (3d Cir. 1985), *cert. denied*, — U.S. —, 106 S. Ct. 1244 (1986); *Dillon*, 746 F.2d at 1003-04; see also *Ursic v. Bethlehem Mines*, 556 F. Supp. 571 (W.D. Pa.), *aff'd in part*, 719 F.2d 670 (3d Cir. 1983) (employing a *Burdine*-like analysis to an ERISA § 510 claim).

Where the plaintiffs' case does consist of *direct* "smoking gun" evidence that the employer acted with discriminatory motivation, however, the Supreme Court has indicated that the *McDonnell Douglas-Burdine* shifting burdens mechanism is inapplicable. *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985); see also *Goodman v. Lukens Steel Co.*, 777 F.2d 113, 130 (3d Cir. 1985) ("The presumptions and shifting burdens are merely an aid—not ends in themselves. When direct evidence is available,

criminate is required. Moreover, this Court, in a nonclass action context, has rejected the intent/impact distinction as requiring different burdens. See *NAACP v. Medical Center, Inc.*, 657 F.2d 1322, 1333-34 (3d Cir. 1981).

problems of proof are no different than in other civil cases.") (citing *Trans World Airlines, supra*; *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711 (1983); *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978)), *cert. granted*, 55 U.S.L.W. 3391 (U.S. Dec. 2, 1986) (No. 85-1625); *Dillon*, 746 F.2d at 1005 ("Once the plaintiff establishes liability the sine qua non for the [McDonnell Douglas] formula no longer exists."); *Bell v. Birmingham Linen Serv.*, 715 F.2d 1552, 1556 (11th Cir. 1983), *cert. denied*, 467 U.S. 1204 (1984) ("McDonnell Douglas . . . pertains primarily . . . to situations where direct evidence of discrimination is lacking"); *cf. Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702 (1978) (policy requiring larger contribution to pension fund from women than from men was discriminatory on its face); *EEOC v. Wyoming Retirement System*, 771 F.2d 1425, 1430 (10th Cir. 1985) (direct evidence of discrimination codified in retirement statute). Guided by these general principles, we turn to appellants' class claims of discrimination under ERISA.

C.

In the proceedings before the district court, "[p]laintiffs . . . assert[ed] that . . . [Continental] deliberately followed a plan for avoiding pension liability as a means of increasing its profits, not that it deliberately increased plant profitability by a means that happened to effect [sic] employees' eligibility for pension benefits." Jt. App. 170. The appellants thus raised a cognizable claim under § 510 which requires that loss of benefits be more than a "mere consequence" of employer conduct. *Titsh*, 548 F.Supp. at 985. Appellants maintained that Continental, in accordance with the alleged discriminatory plan, improperly (1) "capped" the Pittsburgh plant, (2) closed the pail line and (3) laid off members of the employee class, all in violation of § 510 of ERISA. *See* Jt. App. at 31-36. The district court found that the liability avoidance plan was designed to "avoid triggering future vesting." FF 53. Moreover, the court found that all three actions allegedly taken pursuant

to that plan were motivated in part by Continental's desire to prevent appellants from attaining pension eligibility. Nevertheless, the court concluded that none of the challenged actions established a classwide violation of § 510 and, accordingly, entered judgment for Continental. See CL 4-5.

Appellants argue that both the evidence adduced at trial and the findings of the district court establish that Continental violated § 510 by engaging in the challenged conduct for the purpose of interfering with appellants' attainment of pension eligibility for 70/75 and Rule of 65 benefits. Each of the acts that appellants claim was undertaken for proscribed purposes may independently make out a claim of discrimination under § 510. We shall first consider the liability avoidance program. Because the question whether the individually challenged actions of Continental—the layoffs, the capping of the Pittsburgh plant, and the closure of the pail line—constitute violations of the ERISA present similar procedural issues, those claims will be considered together in a separate section, *infra*.

1. Liability Avoidance Program

Appellants first maintain that the overall adoption and implementation of the "Bell System" in itself establishes a classwide violation of § 510 of ERISA. Although the district court made extensive findings of fact with regard to the elements of and the intent underlying the liability avoidance plan, it did not reach a conclusion as to whether these findings constituted a violation of ERISA. Our review of appellants' claim requires us to consider the proof requirements under the Act and to determine whether the evidence adduced at trial satisfies the elements of a § 510 claim.

The central features of Continental's Bell System, as established by the district court's findings, are as follows: (1) to identify Continental's "unfunded pension liabilities," i.e. employees who have not yet attained the required age

and service to qualify for 70/75 and Rule of 65 benefits, *see* FF 53, 64; (2) to designate those employees as "permanently laid off," ineligible for recall absent exigent circumstances, and then only with prior approval of top Continental management, *see* FF 54-57; (3) to alert Continental management through a computerized "red flag" system whenever an employee designated as "permanently laid off" receives a pay check, FF 69-70; and (4) to adjust the level of production to a predetermined level of employment. *See* FF 61, 63. In addition, the district court found that "Continental often referred to the goals outlined in the Bell System as 'liability avoidance.' It had two aspects: (a) sheltering or keeping employed 70/75 qualified employees so that their employment was assured throughout their normal careers; and (b) preventing further employees from qualifying for 70/75 pensions." *See* FF 68.

At the outset, Continental disputes that the liability avoidance plan was implemented at the Pittsburgh plant, and it argues that adoption of the plan, without more, cannot support a finding of liability.³⁴ *See* Brief of Appel-

³⁴ Continental also argues that the question whether the liability avoidance plan in itself violated ERISA was not before the district court. *See* Brief of Appellee-Cross Appellant at 15. The evidence proves otherwise. First, in Count III of the *Jakub* complaint, appellants' maintained at item 38 that "the Company secretly devised and implemented a 'liability avoidance' or 'cap program.' The goal of this program was to prevent employees at the West Mifflin plant from attaining eligibility for these break-in-service pensions by capping the work force." *Jt. App.* at 34. Item 45 of Count III asserted that "[b]y the conduct alleged above, the Company has discharged, suspended and discriminated against plaintiffs for the purpose of interfering with employees' attainment of rights under the Company's benefit plans, all in violation of Section 510 of ERISA, 29 U.S.C. 1140." *Id.* at 36. We think it is clear that appellants challenged the overall liability avoidance program and its requirement that non-vested employees be designated as permanently laid off as discriminatory conduct.

The district court, however, repeatedly thwarted these attempts to challenge the system as a whole, requiring instead proof of an act that

lee-Cross Appellant at 14. We reject both claims. First, Continental's contention that its liability avoidance plan was not implemented at Pittsburgh disregards the evidence and the findings of the district court. The district court

actually interfered with appellants' eligibility as opposed to one taken for the purpose to do so.

During an exchange between the district court and counsel, appellants attempted to explain the gravamen of their complaint.

APPELLANTS: "[I]t is the defendants' action in laying them off, in selecting them for layoff and laying them off that is the subject of this claim.

...

We are not attempting to prove in this case,—Although it might very well be an independent violation, the Court will not be called upon to [decide] in this case that a failure to call back in some discriminatory fashion constitutes a violation of ERISA, although it well may. But that's not what this case is about. *This case is about the selection and designation for layoff of people.* Now as part and parcel of that proof, we have shown the Court and put in testimony that on April 1st, 1977, a red flag system was initiated; that although this system was put into place back then, it became finalized and was allowed to go into place . . . once they got their plant-wide seniority in the fall of '77. . . .

The point was that they put the designation on these people, permanent layoff, red flag was instituted to keep that permanent layoff, designation in place. . . ."

THE COURT: "I don't think it matters whether it is permanent or not. Either if they laid people off permanent or not permanent with the purpose being to prevent them from attaining their pension rights or whatever, it would be a violation of ERISA."

Jt. App. at 468-70 (emphasis added). Although the response of the district court is not an inaccurate statement of a cognizable claim under section 510, it implicitly fails to recognize the particular claim asserted by appellants that the implementation of the plan was itself a violation of ERISA.

found that such a plan—the Bell System—was indeed created by Continental, *see* FF 51-54, 68, that Pittsburgh was selected as one of the three ‘concept development plants’ for the implementation of the plan, *see* FF 62; Jt. App. at 1385, and that Continental was motivated in part by the stated objectives of the liability avoidance plan in making each of the challenged decisions that resulted in the layoffs of individual class members. *See* FF 106, 141.³⁵ Second, as to the claim that adoption alone is insufficient conduct to constitute a violation of ERISA, both Continental and the district court misperceive the breadth of § 510.³⁶ The following colloquy illustrates the point:

³⁵ An internal memorandum of Continental dated July 11, 1977 further indicates that the system was in effect at the Pittsburgh facility. The memorandum included “the explanatory report of the bridge from Bell I to Bell II,” and sought to “ensure the implementation and continued use of Bell II.” Jt. App. at 1073.

³⁶ Both Continental and the district court misconstrued the nature of the act or conduct requirement of section 510 in a class action context. Continental maintains that “[t]o discriminate, there must be some act. The existence of an alleged plan, without more, does not affect a participant.” Brief of Appellee-Cross Appellant at 14. Similarly, in response to appellants’ contention that “the discriminat[ory act] is putting them in a class that precludes their working,” the district court stated: “And I am telling you as a matter of law classifying doesn’t do anything to them.” Jt. App. at 624-25. In the district court’s view, “[s]chemes are only relevant in a conspiracy. We are not involved with a conspiracy here. It doesn’t matter what [Continental’s] scheme was. It’s what they did. It doesn’t matter what they planned; it’s what they did that counts.” Jt. App. at 903.

In a class action context, however, the “scheme” or policy is exactly what is at issue. *See Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867, 875-76 (1984); *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 (1977); *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 772 (1976); *see also General Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 157-59 (1982) (a classwide challenge must encompass more than one allegation of discriminatory treatment). Appellants did not seek to prove the mere existence of an abstract, dormant plan or policy. Rather, they sought to demonstrate that specific acts had been

APPELLANTS: "[T]he definition of the class says clearly people who were designated for layoff; and *the fact that they were designated for layoff then doesn't mean they had to be laid off and then—*"

THE COURT: "Yes, but the act of designation doesn't *deprive them of any ERISA rights.*"

APPELLANTS: "No, Your Honor. It does not."

THE COURT: "And the only—"

APPELLANTS: "*Well, it does discriminate against them. I think labeling them—*"

THE COURT: "But this is not a discrimination case. *This is an ERISA case, and no rights have been taken away from them until they are laid off; and so the designation really has no significance as far as a violation of ERISA is concerned.*"

Jt. App. at 473-74 (emphasis added).

Section 510, however, unlike other anti-discrimination provisions, is designed to *prevent* injury to employees' protected rights, not simply to redress the injury after the goals of a discriminatory plan have been effectuated. See *Zipf*, 799 F.2d at 891. To be certain, the broad, remedial objectives of § 510 do not authorize sanctions merely for an employer's state of mind. There must be some act in furtherance of an employer's desire to interfere with an employee's rights to pension benefits. That act, however, need not achieve the employer's illicit goals. To keep the effects of discriminatory intent "in the air", so to speak, is part of § 510's *raison d'être*. The statute prohibits spec-

taken to implement the allegedly discriminatory plan and that the plan was actually in effect.

ified conduct "for the purpose of interfering with the attainment of any right. . . ." 29 U.S.C. § 1140 (1982). Thus, actual deprivation is not a prerequisite to class liability under § 510, *ergo* the challenged act need not have caused actual deprivation or have actually interfered with the attainment of pension eligibility.

Because the district court construed § 510 as requiring actual deprivation of rights, it failed to consider properly the inchoate components of the liability avoidance scheme that, though producing no immediate or tangible effects on appellants' rights, nevertheless constituted deliberate steps undertaken for the purpose of interfering with appellants' attainment of pension eligibility. When so understood, it is clear that the district court's own findings are evincive of appellants' satisfaction of their burden to establish by a preponderance of the evidence that the plan was infested with discriminatory intent sufficient to constitute a violation of ERISA. Indeed, if Continental's liability avoidance scheme does not constitute direct proof of discrimination under § 510, we are hard pressed to imagine a set of facts that would.

In *Lee v. Russell County Bd. of Educ.*, 684 F.2d 769 (11th Cir. 1982), the Eleventh Circuit observed:

Where the evidence for a *prima facie* case consists, as it does here, of direct testimony that defendants acted with a discriminatory motivation, if the trier of fact believes the *prima facie* evidence the ultimate issue of discrimination is proved; no inference is required. Defendant cannot rebut this type of showing of discrimination simply by articulating or producing evidence of legitimate, nondiscriminatory reasons.

Id. at 774. We think that this standard applies with equal force to this case where appellants presented direct documentary proof of Continental's intent to discriminate against non-vested employees in the adoption and implementation of its liability avoidance plan. *See also Bell v.*

Birmingham Linen Serv., 715 F.2d 1552, 1556-57 (11th Cir. 1983), *cert. denied*, 467 U.S. 1204 (1984) ("It would be illogical, indeed ironic, to hold a . . . plaintiff presenting direct evidence of a defendant's intent to discriminate to a more stringent burden of proof, or to allow a defendant to meet that direct proof by merely articulating, but not proving, legitimate, nondiscriminatory reasons for its actions.").

Moreover, the district court's findings of fact indicate that it credited appellants' case on the ultimate issue of discrimination.³⁷ The district court found that "Bell I was aimed at managing Continental's unfunded pension liabilities, by enabling it to describe its unfunded pension liabilities and to avoid triggering future vesting, while securing the employment of those employees whose benefits had already vested." See FF 53 (emphasis added).³⁸ We read

³⁷ Indeed, Continental did not and does not here dispute the discriminatory motive of the liability avoidance plan. In its answer to the count of appellants' amended complaint that charged that the plan had been conceived with the proscribed intent, see Jt. App. at 34 (Count III, item 38), Continental did not offer an alternative purpose for the plan but rather entered a general denial. See Jt. App. at 44. Continental did attempt to characterize the permanent lay off classification as a mere bookkeeping entry. See *Brief of Appellee-Cross Appellant* at 13. The district court's findings, however, do not support such a characterization. Overall, Continental primarily directed its proof at trial and its arguments before this Court to the affirmative acts of the company alleged by appellants to have been taken pursuant to the discriminatory liability avoidance plan. Those arguments, which will be considered *infra*, do not undercut the allegation that the plan itself was imbued with discriminatory intent and constituted a violation of ERISA.

³⁸ Continental's internal memoranda described the plan as follows: The Bell System . . . enable[s us] to describe our unfunded pension liabilities and develop a strategic approach to avoiding future exposures while at the same time securing the employment of those employees in which the vast majority of the unfunded liability is vested. . . . In a capped situation, our manning latitude is limited to a specific point on the seniority roster. Beyond that point no

the court's finding as establishing that Continental devised its liability avoidance scheme for the sole purpose of preventing employees from attaining eligibility for the break-in-service pensions.³⁹

In sum, appellants contend, and we agree, that the maintenance of the program with the specific intent to interfere with class members' pension eligibility was in itself a class-wide violation of ERISA entitling them to injunctive relief. See *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 360-61 (1977) (proof of a discriminatory policy may justify injunctive relief); cf. *Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. at 876 (proof of pattern and

recall can take place as recall will reinstate the employee's continuous service thereby preventing future liability avoidance. . . . In short, we need to identify, analyze and implement [specified] changes to our manning practices and our business selection and servicing which allow the maximum realization of profit in our capped locations.

Jt. App. at 1074-75

³⁹ That the avoidance of pension liability was Continental's sole purpose in instituting the liability avoidance program cannot be gainsaid. Nor can it be seriously contended that the liability avoidance scheme was legitimately designed to save the company from economic ruin.

Section 510 proscribes exactly this type of conduct. In enacting this provision, Congress recognized that it may sometimes be in the employer's economic self-interest to abort its employees' accumulation of the requisite age and service prior to vesting. Congress sought to provide safeguards for such abuses and to ensure that "an employer cannot fire anybody with impunity to avoid pension liability." 2 *Legislative History of the Employee Retirement Income Security Act of 1974*, at 1811 (1976) (remarks of Senator Javits). Thus, section 510's essential purpose is to prevent employers from intentionally interfering with impending pension eligibility whether motivated by malice toward the particular employee(s) or by a general concern for the economic stability of the company. Of course, as we noted *supra*, incidental loss of pension benefits as the result of a legitimate business practice will not constitute a violation of ERISA. Bad faith, however, is not an element of a section 510 claim.

practice of discrimination entitles class to prospective relief).⁴⁰ In light of the uncontested findings of the district court that establish the requisite discriminatory intent of the liability avoidance plan, *see* FF 53, 68, and in the absence of any rebuttal evidence from Continental that the plan was not so designed—wholly apart from the determination whether individual class members were actually laid off in accordance with the plan—appellants were entitled to an injunction on their claim that the liability avoidance plan, as implemented, violated § 510 of ERISA. *See Dillon*, 746 F.2d at 1004.

2. The Layoffs, the Cap and the Closure of the Pail Line

Appellants' remaining claims charge that Continental took specific actions, pursuant to its intentionally discriminatory liability avoidance scheme that resulted in their loss of employment. As to these claims, appellants assert that in light of the un rebutted evidence that Continental's liability avoidance program was adopted and implemented with discriminatory animus toward non-vested employees, they should have been accorded a presumption that each class member's job loss as a result of those actions was caused by the discriminatory policy. In this regard, appellants argue that the district court erred "in resolving the question whether the liability avoidance program *caused* the class members' loss of work in the liability trial, and imposing the burden on plaintiffs to prove that causation, when that question should have been remitted to the remedy trial with the plaintiffs enjoying a rebuttable presumption that their lost work was caused by the unlawful program and with the burden of proof on Continental to prove otherwise." Brief for Appellants at 22-23 (emphasis

⁴⁰ In the instant appeal, the subsequent shutdown of the Pittsburgh plant renders injunctive relief unnecessary. That appellants adduced sufficient proof entitling them to such relief, however, is unaffected by the closure of the plant.

in original). In any event, appellants continue, "having found that the loss of work was the consequence of mixed motives, [the district court erred] in not imposing the burden on Continental to prove that the loss of work would have occurred in the absence of ("but for") the illegal motivation." *Id.* at 23.

At the conclusion of the "liability" trial the district court found that a motivating factor in Continental's decisions to close the pail line, to cap the Pittsburgh plant and lay off individual and class plaintiffs was to prevent employees from attaining eligibility for 70/75 and Rule of 65 benefits. *See* FF 106, 141. The court also found that Continental was also motivated by legitimate business considerations. *See* FF 107, 142. Continental does not dispute the findings of impermissible motivation; rather, it relies on the findings of the district court that hold that the results of the challenged actions would have occurred in any event, *see* FF 107, 142, as precluding liability.

Our consideration centers around whether the various burdens of proof in a class action where both permissible and impermissible factors are involved were appropriately allocated. In essence, appellants' contention is that in a class action context, the determination whether injury to individual class members was caused by a proved discriminatory policy is properly assigned to the "remedy" phase of the trial with the burden of proving that the injury was not so caused resting with the defendant. Although we agree with appellants' ultimate contention that in this case the "but for" burden of proof was misapplied, we shall take this opportunity to clarify various procedural misconceptions implicit in their argument. In order to assess properly the various elements of appellants' claim, then, it is appropriate to categorize those elements and to treat them separately.

a. Causation

Appellants point to three Supreme Court decisions for the proposition that "questions whether individual job loss

was caused by [a proved] violation . . . are to be addressed in the remedial phase of the litigation." Brief of Appellant at 33. In *Franks v. Bowman Transp. Co.*, *supra*, a class action challenging the seniority and hiring practices of Bowman Transportation was resolved favorably for the plaintiffs. Certain seniority relief, however, was denied and plaintiffs appealed. Upon review, the Supreme Court held that the district court had improperly withheld seniority relief from unnamed members of the class on the basis that there was no evidence presented during the liability proceedings regarding vacancies, qualifications and performance for each member of the class. *Franks*, 424 U.S. at 772. The Court rejected the implication that such evidence was a prerequisite to classwide relief and further explained that where "petitioners . . . have carried their burden of demonstrating the existence of a discriminatory . . . pattern and practice by the respondents . . . the burden will be upon respondents to prove that individuals . . . were not in fact victims of . . . discrimination." *Id.*

International Bhd. of Teamsters v. United States, *supra*, echoed and elaborated upon the *Franks* methodology. In *Teamsters* the Supreme Court considered charges that both the employer and the union had engaged in a pattern and practice of discriminatory conduct. The Court again recognized two distinct stages of class action proceedings and articulated the requisite proof to be adduced at each stage. At the initial 'liability' stage, proof that the discriminatory policy actually existed is all that is required. *See* 431 U.S. at 360. "[T]he question of individual relief does not arise until [the 'remedial' stage, after] it has been proved that the employer has followed an employment policy of unlawful discrimination." *Id.* at 361.

Finally, in *Cooper v. Federal Reserve Bank of Richmond*, *supra*, the Supreme Court again gave recognition to the two-stage methodology. The Court noted that in a class context "[w]hile a finding of a pattern or practice of discrimination itself justifies an award of prospective relief

to the class, additional proceedings are ordinarily required to determine the scope of individual relief for the members of the class.” *Cooper*, 467 U.S. at 876.

In the instant appeal, the proceedings before the district court concluded after the “liability” stage of the litigation with judgment entered for the defendants. Appellants maintain that on the basis of *Franks*, *Teamsters* and *Cooper* the liability phase of this litigation actually ended upon their showing that Continental’s liability avoidance program constituted a classwide violation of § 510 and that all questions of causation should have been remitted to the remedial phase of the litigation with the “but for” burden of proof resting with Continental. Appellants’ argument is flawed in two respects.

First, this Court recently questioned the utility of approaching the burdens issue according to the label affixed to the particular stage of the litigation. Rather, in *Dillon v. Coles*, *supra*, we determined that the more helpful approach is to “review the proof requirements in each instance.” 746 F.2d at 1004. Thus, determining whether the burden of proving causation is properly allocated depends not so much on the particular stage of the proceedings as on the actual evidentiary proofs in the record at the time of the allocation.

The Supreme Court’s decision in *Burdine* makes clear that the plaintiff bears the burden of persuasion by a preponderance of the evidence to establish a case of discrimination. See *Burdine*, 439 U.S. at 252-53. The Court’s decisions in *Franks*, *Teamsters* and *Cooper* require no less: The class representative bears the initial burden to make out the prima facie case, see *Teamsters*, 431 U.S. at 360 (interpreting *Franks*), and must “ultimately . . . prove . . . that . . . discrimination was the company’s standard operating procedure—the regular rather than the unusual practice.” *Id.* at 336 (emphasis added); see also *Cooper*, 467 U.S. at 876 (same). Where the ultimate factual de-

termination is still at issue, the "but for" burden of proof is properly assigned to the plaintiff and may operate to discharge the plaintiff's burden of persuasion and entitle him or her to relief.

In the instant appeal, the district court erroneously construed this "but for" burden as requiring appellants to prove that "but for" Continental's consideration of their impending pension eligibility, appellants would have *remained* at work; instead, that burden only requires proof that "but for" the impermissible consideration, appellants' would not have *lost* work. The distinction is significant. As this Court explained in *Bellissimo v. Westinghouse Elec. Corp.*, 764 F.2d 175 (3d Cir. 1985), *cert. denied*, — U.S. —, 106 S. Ct. 1244 (1986):

The "but for" test does not require a plaintiff to prove that the discriminatory reason was *the* determinative factor, but only that it was a determinative factor. Interpreting Title VII to require proof of "the determinative factor" is inconsistent with the "but for" causation test, insofar as plaintiff would be required to show that the discriminatory motive was the *sole* reason for the action taken. More than one "but for" cause can contribute to an employment decision, and if any one of those determinative factors is discriminatory, Title VII has been violated.

Id. at 179 n.1 (citations omitted).

Similarly, § 510 of ERISA requires no more than proof that the desire to defeat pension eligibility is "a determinative factor" in the challenged conduct. From our review of the record, it is manifest that the district court considered the appellants' burden of proof on causation to be significantly heavier than that required by our precedent. *See, e.g., Bellissimo*, 764 F.2d at 179 n.1 (but for causation requires proof that "the discriminatory reason was . . . a determinative factor") (emphasis in original); *Lewis v. University of Pittsburgh*, 725 F.2d 910, 915-16

(3d Cir. 1983), *cert. denied*, 469 U.S. 892 (1984) (but for causation requires more than proof that discriminatory reason was 'a substantial' or 'a motivating factor' in challenged decision); *Smithers v. Bailer*, 629 F.2d 892, 898 (3d Cir. 1980) (plaintiff need only prove that the discriminatory reason "made a difference" in the challenged decision). *Accord Dillon, supra*; *Duffy v. Wheeling Pittsburgh Steel Corp.*, 738 F.2d 1393 (3d Cir.), *cert. denied*, 469 U.S. 1087 (1984). The district court repeatedly indicated that appellants' must prove not only that their impending pension eligibility made a difference in Continental's decisions that resulted in their layoffs, but also that those decisions and, consequently, their layoffs would not have occurred for any other reason.⁴¹ *See* Jt. App. at 480, 628-33, 637-39, 676-77.

Under this Court's formulation of the "but for" test of causation, appellants' properly challenged the district court's application of a markedly different standard of proof. We stress, however, that our determination that the

⁴¹ The district court stated:

[T]he courts have said that the tests that you apply are, you say, "Was [Continental's] desire to limit liability under ERISA . . . a determinative factor in the action that they took," but the courts have also said that the test you apply is "but for." In other words, but for their desire to limit liability, would this action have been taken? In other words, if the action would have been taken anyhow . . . for other reasons, [appellants] lose, . . . even though their desire to limit their liability was a determinative factor.

Jt. App. at 480. The district court's statement misrepresents the law on at least two levels. First, as became clear in subsequent colloquies, the court considered the burden of proving that the action would not have been taken for other reasons as resting with the appellants. As stated by appellants and supported by the case law, however, their "burden [is] to show [that the discriminatory reason] . . . made a difference. [They did] not have the burden to rule out all other causes." Jt. App. at 676. Second, in the district court's view, success on the merits required more than proof that discriminatory motivation was a determinative factor in challenged conduct. *See* discussion, *infra*.

district court erred in its application of the "but for" causation test is based upon the particular test applied, not on the propriety of requiring proof of causation as a prerequisite to a finding of liability. As to the latter issue, we think it clear that "but for" causation, properly construed, is an element of plaintiff's ultimate burden of persuasion. Appellants' broader contention, that their demonstration of a classwide violation in the adoption and implementation of the liability avoidance plan relieved them of the burden of proving that their job loss due to the cap of the Pittsburgh plant and the closure of the pail line was a result of the plan, however, requires further analysis. In this regard, it is necessary to determine the scope of the presumption that arises from proof of the discriminatory policy.

b. Presumption Of Individual Discrimination

There can be little doubt that upon proof of an intentionally discriminatory plan or policy, a presumption that they were actual victims of the discriminatory policy inures to the benefit of the individual class members.⁴² See *Franks*, 424 U.S. at 772. In *Teamsters*, the Supreme Court stated that "[t]he proof of the pattern or practice supports an inference that any particular employment decision, during the period in which the discriminatory policy was in force, was made in pursuit of that policy." 431 U.S. at 362. Here, appellants urge that they were deprived of the *Teamsters-Franks* rebuttable presumption that each individual class member's job loss occurring during the period in which

⁴² "The force of that proof does not dissipate at the remedial stage of the trial. The employer cannot, therefore, claim that there is no reason to believe that its individual employment decisions were discriminatorily based; it was already been shown to have maintained a policy of discriminatory decisionmaking." *Teamsters*, 431 U.S. at 361-62. Put otherwise, in a class action setting, once the class representative has met the burden of persuasion on the ultimate issue in the case—whether the employer intentionally discriminated against the class—each individual member of the class is presumptively entitled to relief.

the liability avoidance program was in effect was caused by that discriminatory program. Before addressing appellant's contention we think it necessary to clarify the nature and scope of the *Teamsters-Franks* presumption.

The presumption that arises upon proof of a discriminatory policy attaches to all employer actions that may reasonably be considered as within the ambit of that policy. In other words, the *Teamsters-Franks* presumption presupposes a vertical nexus between the proved discriminatory policy and the employer conduct for which individual relief is sought. Thus, proof that an employer's standard operating procedure with respect to its hiring policies is intentionally discriminatory may not necessarily support a class member's individual challenge of the employer's promotion practices. Cf. *General Tel. Co. of Southwest v. Falcon*, 457 U.S. 147 (1982) (individual's challenge of employer's promotion practices did not necessarily render him an adequate representative for class challenging hiring practices). Similarly, the determination that an employer engages in classwide discrimination on one level is not tantamount to a conclusion that it does so on all levels. Thus, while proof of a discriminatory policy in one area of employment practice may be probative of the employer's intent in another area, it will not necessarily establish a presumption that the second area is similarly infested with the illegal intent.

At trial of this action, Continental specifically maintained that each of its challenged employment decisions were taken for legitimate purposes and not pursuant to the liability avoidance program.⁴³ Under these circumstan-

⁴³ Indeed, as we noted *supra*, Continental contends that the liability avoidance program was never implemented at the Pittsburgh plant. That we have rejected this contention does not deprive Continental of its defense of legitimate purposes as to the individually challenged decisions. On the facts of this case, however, whether Continental bears a burden of persuasion or production as to its legitimate purpose de-

ces, Continental would have the *Burdine* burden shifting mechanisms apply at the threshold to each challenged act with the initial burden of persuasion on the plaintiff to prove a *prima facie* case by a preponderance of the evidence that each act was a result of discriminatory intent. Continental suggests that to require otherwise would be to fasten liability onto Continental for "discrimination in the air." Brief for Appellee-Cross Appellant at 27 (paraphrasing *Dillon*, 746 F.2d at 1004). Continental misreads both our opinion in *Dillon* and the Supreme Court's decisions in *Franks* and *Teamsters*.

In *Dillon* this Court noted that in a class action context "the liability phase of the case is not concluded until [the individual class member] . . . demonstrates his own basis for an award." 746 F.2d at 1004. The court continued:

It is misleading to speak of the additional proof required by an individual class member for relief as being part of the damage phase; that evidence is actually an element of the liability portion of the case. Until the individual has demonstrated actual injury to himself, the court may not direct individual relief. Just as in the tort field, where "negligence in the air" is not enough to fasten liability on a defendant, so in a Title VII case discrimination in general does not entitle and individual to specific relief.

*Id.*⁴⁴

fense depends on the specific act for which the defense is offered. See *infra*.

⁴⁴ Appellants suggest that our decision in *Dillon* is inconsistent with *Franks*, *Teamsters* and *Cooper*. We do not read *Dillon* as presenting such a conflict. First, *Dillon* primarily emphasized that the designation of a proceeding as liability or remedy should not be determinative of the proof required of the litigants in a discrimination suit. At any rate, we do not think the substantive discussion in *Dillon* is at odds with Supreme Court precedent. The additional proof to which *Dillon* refers consists of the demonstration that "vacancies or oppor-

Continental maintains that it "met its burden of proving that no one in Pittsburgh was affected by any alleged discriminatory policy [and t]hus, any presumption as to each Plaintiff and each class member disappeared and there was no basis for any remedy for anyone." Brief of Appellee-Cross Appellant at 26. Continental moves too far too fast.⁴⁵ While the "discrimination in the air" concept is relevant to an individual's entitlement to relief, it does not affect the presumption that arises upon proof of a discriminatory policy. Indeed, as recognized by this Court in *Dillon*, "[i]n a class action setting, an individual member may build on the discrimination established by the class." 746 F.2d at 1004. Thus, before reaching the question of individual entitlement, the preliminary issue concerns the nature and scope of the presumption arising from appellants' proof of a discriminatory policy.

In the instant appeal, Continental attempts to capitalize on the independent nature of appellants' § 510 claims. Because each challenged act may itself constitute a class-wide violation of ERISA, Continental essentially argues that each claim must satisfy the *Burdine* burden shifting

tunities for employment or advancement existed." 746 F.2d at 1004. In the context of ERISA, after the class has established that it is entitled to an injunction, an individual class claimant need only show that s/he was eligible for break-in-service pensions, was available for work, designated as permanently laid off and laid off prior to vesting. As to why s/he was laid off, as noted in *Teamsters*, "the employer [i]s in the best position to show why any individual employee was denied an employment opportunity." 431 U.S. at 359 n.45.

⁴⁵ The defect in Continental's position stems from its erroneous assumption that the *Teamsters-Franks* rebuttable presumption "is no different than the rebuttable presumption existing after a plaintiff presents a prima facie case." Brief of Appellee-Cross Appellant at 24. To the contrary, the presumptions arising from each situation are quite distinct. As to the latter presumption, defendant's burden on rebuttal is merely one of production; as to the *Teamsters-Franks* presumption, however, the defendant's burden is one of persuasion. See discussion *infra*.

mechanism. Appellants would therefore bear the initial burden to prove by a preponderance of the evidence that Continental engaged in each act with the illegal intent to discriminate. Continental could then meet appellants' *prima facie* case by articulating a nondiscriminatory reason for its actions which raises a genuine issue of fact as to whether it discriminated. The effect of this approach, however, is to discount appellants' direct documentary proof of the discriminatory liability avoidance program, and consequently, to reduce Continental's burden on rebuttal. Such an approach is contrary to *Franks* and *Teamsters*.

Having established that Continental adopted and implemented a program premised on impermissible considerations and designed to achieve a discriminatory result, appellants were entitled to "an inference that any particular employment decision, during the period in which the discriminatory policy was in force, was made in pursuit of that policy." *Teamsters*, 431 U.S. at 362. We hold that the scope of the presumption arising from the discriminatory liability avoidance plan extends to those discrete acts which, as found by the district court, were specifically contemplated to implement the plan—namely, the designation of class members as permanently laid off, *see* FF 57, the institution of the red flag system *see* FF 69-70; and the capping of the Pittsburgh plant, *see* FF 54.

We are satisfied that as to these particular acts the vertical nexus contemplated by *Franks* and *Teamsters* inheres in the various components of the plan. While we recognize that the plan also specifically contemplated shifting business volume so as to avoid incurring additional pension liability, *see* FF 63, we are not convinced that the closure of pail line alone establishes the requisite nexus with the plan. Thus, the presumption arising from appellants' proof of the discriminatory liability avoidance program does not automatically extend to Continental's decision to close the pail line. That the presumption does

not so extend, however, does not alter the ultimate outcome of this appeal.

3. The *Teamsters-Franks* Presumption and the "But For" Burden in Mixed Motive Cases.

In *Franks*, *Teamsters*, and *Cooper*, *supra*, the Supreme Court acknowledged the propriety of shifting the burden of persuasion onto the defendant if it sought to avoid liability after proof of a discriminatory policy had been adduced. Thus, if after sifting through the evidence, a district court determines that the defendant has failed to introduce admissible or credible evidence sufficient to rebut the plaintiff's case, then, in accordance with *Franks*, *Teamsters* and *Cooper*, the "but for" burden of persuasion rests properly with the defendant. This "but for" burden requires proof from the defendant that it would have reached the same decision or engaged in the same conduct in any event, i.e., in the absence of the impermissible consideration, and operates to limit the scope of the relief available to individual class members. This Court has recognized that "placing the burden on the employer 'to demonstrate that the individual [class] applicant was denied an employment opportunity for lawful reasons,' is entirely consistent with the *Burdine* allocation of burdens in a suit brought by an individual plaintiff." *Dillon*, 746 F.2d at 1004 (quoting *Teamsters*) (citation omitted). This is so because at this stage the ultimate burden of persuading the court that the employer intentionally discriminated against the class has been carried. Thus, "[n]o reason appears . . . why the victim rather than the perpetrator of the illegal act should bear the [but for] burden of proof. . . ." *Franks*, 424 U.S. at 773 n.32. In sum, placing the "but for" burden of proof on the employer at this juncture honors the presumption that arises upon proof of a discriminatory policy that the individual class members were discriminated against in accordance with that policy, while affording the employer the opportunity to limit its liability upon proof that, as to certain class members, it would have reached

the same decisions in the absence of the illegal motivation. See *Mt. Healthy City School District Bd. of Ed. v. Doyle*, 429 U.S. 274, 287 (1977); cf. *East Texas Motor Freight Sys. Inc. v. Rodriguez*, 431 U.S. 395, 403 n.9 (1977) (citing *Mt. Healthy* in Title VII context); *Bibbs v. Block*, 778 F.2d 1318 (8th Cir. 1985) (in banc) (applying *Mt. Healthy* to Title VII action); *Blalock v. Metals Trades, Inc.*, 775 F.2d 703 (6th Cir. 1985) (same).

At the outset, we recognize that this Court has held that proof that an impermissible consideration was a "substantial" or "motivating" factor in an employer's challenged conduct is insufficient to carry the plaintiff's burden of persuasion on the ultimate issue of discrimination. *Lewis v. University of Pittsburgh*, 725 F.2d 910, 915 (3d Cir. 1983), cert. denied, 469 U.S. 892 (1984). In the instant litigation although the district court found that the desire to prevent pension eligibility was "a motivating factor" in each of Continental's challenged decisions, we do not read the court's findings and ultimate conclusion that liability was not established in this case as resting on the determination that appellants had failed to prove the requisite degree of motivation, but rather, that appellants had failed to prove that "but for" that motivation they would have remained at work. Thus, we find it unnecessary to review the various versions of the facts urged by the parties before this Court. Nor do we deem it in the interest of justice to remand for clarification of the district court's findings. Indeed, to construe the district court's findings otherwise would render them clearly erroneous. As the Supreme Court explained in *Anderson v. City of Bessemer City*, 470 U.S. 564 (1985), "'a finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" *Id.* at 573 (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948)). From our review of the entire record, we are convinced that the desire to

defeat pension eligibility was a "determinative" factor in each of Continental's challenged actions. *Bellissimo*, 764 F.2d at 179 n.1. A finding to the contrary would be clearly erroneous.

We now turn to the final issue in this case: the effect of the *Teamsters-Franks* presumption on the defendant's burden on rebuttal where discriminatory intent is established by proof that both permissible and impermissible factors motivated the challenged conduct. We conclude that whether the class representative discharges his or her burden of persuasion by offering direct proof of discrimination, circumstantial proof of discrimination or proof of mixed motivation, the *Teamsters-Franks* presumption attaches to each individual class member's claim that s/he was a victim of the discriminatory policy.

The class met its burden of proving that Continental's liability avoidance plan was discriminatory and the class members were therefore entitled to a presumption that their layoffs, as a result of the capping of the Pittsburgh plant, were in pursuant of that plan. *See* discussion, *supra*. Moreover, the district court's findings establish that appellants independently carried their burden of persuasion that Continental closed the pail line, capped the Pittsburgh plant and laid off individual members of the class for discriminatory purposes. Thus, as to each of the actions challenged by appellants, liability was established. Continental thereafter bore the burden of persuasion to prove by a preponderance of the evidence that it would have made the same decisions in any event.

On the facts of this case, however, the district court required the appellants to bear the burden that property rests with the defendant. Thus, the district court erred by misallocating the "but for" burden of proof that arises *after* appellants have carried their burden of persuasion on the ultimate issue of discrimination. That the court required appellants to prove that "but for" Continental's

decision to abort their pension eligibility they would have remained at work is manifest. We need only recite a few colloquies from the record:

THE COURT: "But if the defendants came in here and admitted that in order to avoid pension liability they laid these people off and they refused to recall them and that their sole reason was to avoid pension liabilities,—"

APPELLANTS: "Yes."

THE COURT: "—but then went on to say, 'But it doesn't make any difference, because we didn't have enough work to keep these people busy anyhow—so they would have been laid off even if that wasn't the case, and they wouldn't have been recalled even though that wasn't the case, because we didn't have any business,'—"

APPELLANTS: "Right."

THE COURT: "—you could not succeed."

APPELLANTS: "Well, unless I persuaded you—First of all, that would be an item of damage. But if they did that, if they sustained their burden, then I agree that I would then have to show you that that was a ruse or not true. They would have the burden of proving that to you if they were able to present such testimony, but that would be an item of damages."

THE COURT: "Yes, but you first have the burden."

APPELLANTS: "That's true. We have the burden of showing by a preponderance—"

THE COURT: "You have the overall burden."

APPELLANTS: "Of showing by a preponderance of the evidence in accordance with the standards that this made a difference."

THE COURT: "And because as to the recalls a directed verdict was issued because you presented no evidence, *it requires you to present in evidence that these people would have been recalled—*"

APPELLANTS: "If the Court—"

THE COURT: "*—except for the fact of their evil intent.*"

Jt. App. at 630-31.

THE COURT: "[J]ust assuming, not that they are admitting, but assuming that [Continental] would admit they didn't want to pay pensions and they would do anything they could to avoid paying pensions, unless you can prove these people would have worked if they didn't have that attitude about pensions, you can't win."

APPELLANTS: "It is true that on damages—I think, Your Honor, that has to do with damages. If they came in and said, 'Yes, we laid them off to avoid pension liability, we discriminated against them, we—' "

THE COURT: " 'But it doesn't make any difference because we didn't need them anyhow.' "

APPELLANTS: "But if they say, 'We violated the statute, we discriminated against

them, we laid them off, we discriminated, we called them—that's why we laid them off, to avoid pension eligibility,' then on liability they have violated the statute. As to damages—"

THE COURT: *"I'm saying no, they haven't, unless you show that but for that, [appellants] would have worked."*

Jt. App. at 632-33. Finally, the court summarized its view of the allocation of the burden of proof in the following passage:

THE COURT: *"The problem I am having, Mrs. Litman, very truthfully is, even if you prove that they did this deliberately with the intent to deprive these people of their pension rights, unless you are able to show that they would have been called back but for that, you haven't proved your case."*

Jt. App. at 637 (emphasis added).

We think it clear that the district court required appellants to prove more than that Continental's desire to prevent pension eligibility was a determinative factor in their layoffs. Because we find that the district court misallocated the burden of proof on this issue we do not reach appellants' contentions that the court's factual findings in this regard were clearly erroneous.

CONCLUSION

In sum, we find that the district court erred in failing to conclude that Continental's liability avoidance plan constituted a classwide violation of ERISA. The district court properly determined that causation was an element of li-

ability and that the burden of proof on that issue lay with the appellants. The district court erred, however, in not recognizing that appellants carried their burden of proof on causation by establishing that Continental's challenged decisions were motivated by both permissible and impermissible factors. Finally, the district court erred in allocating the "but for" burden of proof on appellants as to their challenges to their layoffs, the capping of the Pittsburgh plant and the closure of the pail line, requiring them to prove that "but for" Continental's consideration of impermissible factors they would have retained their jobs.

Accordingly, we will reverse the judgment of the district court and remand for proceedings to determine the appropriate relief. We emphasize our holding that Continental's liability avoidance scheme constituted a violation of ERISA when, pursuant to that scheme, individual class members—whether currently at work or already layoff status—were designated as permanently laid off for the purpose of defeating their pension eligibility. Upon such designation, each class member was entitled to some relief from the illegal scheme. At what point and in what amount actual damages, if any, began to accrue as to any particular class member, however, will be a determination to be made in the proceedings upon remand. In those proceedings, individual class members must first establish that they were (1) non-vested employees eligible for 70/75 and Rule of 65 benefits, (2) available for work, (3) labeled as permanently laid off by Continental, and (4) laid off or continued on layoff status prior to attaining eligibility for those benefits. Continental must then be afforded the opportunity to present evidence that as to any particular individual class member's request for relief, that individual is not so entitled because in the absence of Continental's illegal plan that individual would have been without work at the same time in any event. We do not foreclose an opportunity for Continental to submit its proofs collectively as to all of the plaintiffs. That is, if the proof as to each

individual is the same, there is no requirement that Continental repeat the same evidence for each claimant. Continental must establish either collectively or individually that class members would have suffered the same loss of work even in the absence of the illegal plan. Continental's burden on this issue will be one of persuasion.

A True Copy:

Teste:

*Clerk of the United States Court of Appeals
for the Third Circuit*

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
PENNSYLVANIA**

Civil Action No. 81-1519

ROBERT GAVALIK, *et al.*,

Plaintiffs,

vs.

CONTINENTAL CAN COMPANY,

Defendant.

Civil Action No. 82-1995

ALBERT J. JAKUB, *et al.*,

Plaintiffs,

vs.

CONTINENTAL CAN COMPANY, a member of Continental Can
Group, Inc.,

Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Plaintiffs in these consolidated actions allege violations of § 510 of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1140.

On January 17, 1984, the Court granted plaintiffs' motion for class certification under Fed. R. Civ. P. 23(b)(3) in Civil Action No. 82-1995 and held that it would consider these consolidated cases as a single class action. (*See* Civil Action No. 81-1519, docket entry No. 176). The class consists of the following members:

[A]ll Continental employees who did not achieve eligibility for Rule of 65 or 70/75 pension benefits who were determined by Continental to be permanently laid off in 1976, 1977 or 1978 because of Continental's decision to cap the Pittsburgh plant, including but not limited to all employees whose names fall below Francis Conti's on Continental's seniority roster.

This action was bifurcated as to liability and damage issues for trial. The matter proceeded to trial on the issue of liability on July 22, 1985, and concluded on August 8, 1985. Having considered the testimony, reviewed the exhibits and read those depositions admitted into evidence, this Court now enters its Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. Individual and class plaintiffs are former employees of Continental Can Company U.S.A.'s (Continental or the Company) Pittsburgh plant located in West Mifflin, Pennsylvania.
2. Plaintiffs are all participants in an employee benefit plan within the meaning of 29 U.S.C. §1002(7).
3. The United Steelworkers of America, AFL-CIO (USW or the Union), and Local Union No. 4337 (Local 4337) are the recognized collective bargaining agents for the individual and class plaintiffs.
4. During 1977, each of the plaintiffs was a member of Local 4337.
5. Continental is a corporation doing business in Pennsylvania and is a member of the Continental Group, Inc.
6. Continental is engaged in the business of can manufacturing.

7. Continental is an employer engaged in commerce within the meaning of 29 U.S.C. §1003(a)(1).

I. Continental's Employee Benefit Plan

8. As a result of a collective bargaining agreement with the USW (the Master Agreement), Continental agreed, effective November 1, 1977 through February 15, 1981, to provide the following benefits to plaintiffs:

A. Pensions

9. Normal Pension—an employee who had completed 10 years of credited service at age 62 could elect to retire and would receive a lump sum retirement allowance covering the first three months of retirement, and after three months a normal pension, which amount was determined on the basis of years of service and job classification.

10. Reduced Early Pension—an employee who had completed 10 years of regular continuous service may retire any time after reaching age 60 and before reaching age 62 and receive a lump sum retirement allowance covering the first three months of retirement, and after three months a reduced early pension.

11. Thirty-Year Pension—an employee who had completed 30 years of regular continuous service may, at his option, retire at any time before reaching age 62 and receive a lump sum retirement allowance covering the first three months of retirement, and after three months a 30-year pension.

12. 70/75—an employee may retire before age 62 with a lump sum retirement allowance covering the first three months of retirement, and after three months a 70/75 pension. The 70/75 pension is equal to the normal pension. In addition, the employee receives a monthly supplement of \$300 (\$230 for payments due before August 1, 1977) until eligible for social security, which is normally until age 62.

13. In order to qualify for a 70/75 pension, an employee must meet the following requirements:

a. His regular continuous service is broken for at least two years as a result of a permanent plant shutdown, involuntary layoff or absence due to physical disability; and

b. The employee completed at least 15 years of continuous service and is 50 years of age or older and whose combined age and service equal 70 or more; or

c. The employee has completed at least 15 years of regular continuous service and whose combined age and service equal 75 or more.

14. Rule of 65—an employee not entitled to retire on a 70/75 pension whose last day worked was on or after March 1, 1977, is entitled to a Rule of 65 pension upon meeting the following requirements:

a. The employee's regular continuous service is broken for at least two years as a result of a plant shutdown, involuntary layoff or physical disability which extends for more than two years, or Continental decides prior to that time that it is unlikely that the employee is likely to return to work;

b. The employee completed 20 years of continuous service as of the last day worked;

c. The employee has not attained age 50 and whose combined age and years of service equal 65 or more but less than 75; and

d. The Company has not provided the employee with suitable long-term employment.

15. The Rule of 65 pension benefit is equal to the normal pension, except that Rule of 65 payments are reduced by

the amount of income that the employee earns during lay-off.

16. Disability Retirement—an employee who has completed at least 10 years of regular continuous service, and was under age 62, and who became totally and permanently disabled, could retire and receive a normal pension and a monthly supplement of \$300 (\$230 for payments due before August 1, 1977) until eligible for social security.

17. Deferred Vested Benefit (DVB)—an employee who broke his regular continuous service for any reason and was not eligible for a pension, was entitled to a DVB if he had completed 10 years of credited service at the time of the break in service. The DVB was payable in full upon the employee reaching age 62.

18. An employee who has completed 17 years of regular continuous service as of the last day worked and is on layoff or has broken his regular continuous service because of a plant shutdown may elect to receive payment of the DVB in the form of a lump sum.

19. An employee's regular continuous service begins on the day the employee was hired and is broken if the employee is absent for more than two years due to: (a) layoff; (b) approved leave of absence; (c) physical disability; or (d) permanent plant shutdown with respect to which he did not elect to receive a severance allowance.

20. An employee's regular continuous service for pension and employee benefits continued for two years after layoff. This was known as "creep."

21. Under the 70/75 pension plan, an employee could creep into the necessary age and service requirement.

22. Under the Rule of 65 benefit, an employee could creep into the age requirement but could not creep into the service requirement.

B. Insurance

23. Continental employees were entitled to vision, health, life and disability insurance benefits. All retired employees (except those receiving DVB pensions) were entitled to receive health and life insurance benefits.

C. Supplemental Unemployment Benefits (SUB)

24. An employee with 10 years of continuous service is entitled to receive between 60 and 70 percent of his salary during layoff in addition to his unemployment benefits.

D. Expanded Employment Program (EEP)

25. An employee with 15 years of regular continuous service is entitled to an extended 13 weeks vacation once every 5 years.

26. In addition to their employee welfare benefits, USW employees were paid for 10 holidays at the number of straight-time hours he normally worked on his regular shift, but not more than 8 hours.

27. An employee who was required to work any of the observed holidays received holiday pay. In addition, he received 1-1/2 times his regular straight-time hourly rate for the first 8 hours of work and 2-1/2 times his regular straight-time hourly rate for all work he was required to work over 8 hours.

II. History of Continental's Business

28. Continental, like other can manufacturers, experienced a period of growth, particularly during the 1960's and continuing until the early part of the 1970's.

29. The base box volume, which is the can industry's standard of measurement, of Continental grew from 34.3 million to 44.8 million from 1960 to 1970.

30. From 1965 to 1970, Continental opened over 41 new plants and closed 11 facilities. By 1975, Continental had 92 plants.

31. Unlike its growth pattern of the 1960's, Continental experienced a steady decline in its volume of business in the 1970's, as evidenced by the following:

a. The number of plants decreased from a high of 92 in 1975 to 66 in 1979, including the closing of 7 plants in 1976, 7 in 1977, and 6 in 1978.

b. Since 1975, Continental has closed 33 can-making facilities and, during that time, no plants comparable to the Pittsburgh plant were opened.

c. The base box volume in beverage cans decreased from 12.0 billion in 1970 to 10.4 billion in 1978.

d. Hourly employees decreased from 15,000 in 1974 to under 10,000 in 1979, a reduction of 33 percent.

e. Salaried employees decreased by 50 percent from 1973 to 1982.

32. The loss of business was caused principally by:

a. The advent and increasing use of composites, such as plastics instead of steel cans;

b. The change from steel cans to aluminum cans;

c. The increase in self-manufacturers, i.e. industries which formerly purchased cans started to make cans themselves; and

d. Technological changes in the industry.

33. The most significant technological change was the conversion from 3-piece cans to 2-piece cans. Two-piece can lines produced cans faster with fewer employees and

eliminated not only the making of one end, but also the separate lithographic operation which does the decorating work for the cans. Unlike a 3-piece can, the lithographic work was done in the production line on a 2-piece can.

34. In 1970, Continental had 147 3-piece beverage can lines and only one 2-piece line. By 1979, there were 54 3-piece beverage lines and 28 2-piece beverage lines.

III. Benefit and Labor Costs

35. In the mid-1970's, Continental recognized that benefit and labor costs had become a major expense. In preparing for the 1977 negotiations, Continental reviewed annual labor costs for USW employees for the year 1972 and for the year 1977 and found them as follows:

	<u>1972</u>	<u>1977</u>
Wages (including overtime)	\$7,152/year	\$14,224/year
Benefits:		
— group ins. (active)	\$ 624	\$ 2,300
— group ins. (retiree)	\$ 192	\$ 354
— pension (normal)	\$ 480	\$ 1,132
— pension (past service)	\$ 224	\$ 281
— taxes	\$ 464	\$ 1,071
— SUB	\$ 144	\$ 187
— vacation/bonus	\$ 448	\$ 1,309
— holidays	\$ 288	\$ 639
— EEP	\$ 176	\$ 408
— shift premium/misc.	<u>\$ 240</u>	<u>\$ 391</u>
Total Benefits	\$3,280/year	\$8,072/year
Total Annual Labor Cost	\$10,432/year	\$22,296/year

36. An employee who had over 10 years of service would receive the entire benefit package for the full year and full credit for EEP if he worked only one day in a particular year.

37. Almost 70 percent of Continental's benefits costs were related to an employee who worked one day. The other 30 percent for holiday pay and payroll related taxes was generated on a relatively variable basis as a function of hours worked.

38. If an employee was recalled to work for one day, that day commenced a new 2-year continuous service period, even if immediately laid off, plus renewal of other benefits.

39. Based on actuarial assumptions, Continental contributed to a pension trust on the assumption that an employee would work until age 62, at which time his pension would be fully funded. Unfunded liability is that portion of a pension which has not yet been funded by contributions.

40. As of 1977, the triggering of a 70/75 pension benefit could cost Continental, depending upon the employee's years of service and age, between \$40,000 to \$100,000 per employee.

41. Under the applicable accounting principles used by Continental prior to 1981, if any plant would close, the amount of the unfunded pension liability had to be charged against income in the year the plant was closed.

IV. Continental's Work Force Management Program (the Program)

A. Why the Program Was Implemented

42. In the early 1970's, due to a decline in its business, Continental had excess plants and employees and under-utilized equipment and had projected a continued decline in its business.

43. In 1972, Continental realized that with its reduced business, it would be required to close various operations, modernize, and realign its facilities. To provide a method

for funding the cost to be incurred, including employee benefits such as continued insurance coverage, SUB and 70/75 pensions, it created a reserve of \$231 million. The reserve was called Extra Charge Authorization (ECA).

44. By 1976, this reserve had been substantially consumed and Continental knew that it was going to incur further expenses as a result of its continually declining business.

45. In 1976, Continental created another reserve in excess of \$100 million to fund such expenses. This reserve, which unlike ECA which came out of the income of the parent company, came out of the income of the can company. It was called the Plant Utilization Program (PUP). This reserve provided funds for various costs which would be incurred in the event of a plant shutdown, including employee benefits.

46. Many of the Continental USW employees at the Pittsburgh plant were working less than 1,000 hours a year, to wit:

<u>Year</u>	<u>Number of employees working less than 1,000 hours per year</u>
1975	215
1976	162
1977	118
1978	76

Continental determined that an efficient and hence optimum level of manning would result in an employee working between 1,800 and 2,000 hours per year.

47. Each plant had a number of employees who were employed when other employees were on vacation, sick leave, EEP and other temporary leaves of absence. This was referred to as "float." In order to decrease its float requirements, Continental tried to schedule vacations and EEP on a steady and regular basis throughout the year

and not concentrated in the summer months when business was at a peak.

48. Continental employees at Pittsburgh preferred working on a steady basis throughout a year, rather than constantly being laid off and recalled to work.

49. In 1975, Continental recognized that in a period of declining business, it had to more carefully manage its work force to obtain better utilization and to more evenly distribute production throughout the year.

50. In order to operate more efficiently, Continental determined that it would have to concentrate its business into plants which would be more efficiently and fully utilized.

B. What Was the Program

51. In 1976, Stephen Rexford, Manager of Employee Relations and Strategy Planning, was put in charge of a project aimed at raising the plant manager's understanding of the employee benefit expense to the same level of other business costs.

52. Rexford developed a system known as the Bell System.

53. Bell I was aimed at managing Continental's unfunded pension liabilities, by enabling it to describe its unfunded pension liabilities and to avoid triggering future vesting, while securing the employment of those employees whose benefits had already vested.

54. In order to implement the goals of Bell I, Continental developed a "cap and shrink" program. A "cap" was defined as a work force reduction in order to reduce unfunded liabilities. A "shrink" was defined as a work force reduction due primarily to market or manufacturing conditions.

55. The decision to cap and shrink a plant was made on the basis of employee benefit costs, a given plant's age, capital depreciation, condition, layout, machinery, customer base, manufacturing effectiveness and capability, product mix, geographical proximity to markets, proximity to transportation, and lease provisions.

56. In determining the cap or manning level of a plant, Continental considered the needed level of production to meet projected sales and, based thereon, limited the employment level to a specific name on the seniority roster. This cap was to remain in place for five years, without recalling employees from layoff unless business conditions justified the recall and approval was received from the highest level of Continental's management.

57. Employees below the cap who were laid off were designated as permanently laid off. Continental did not inform these employee's that they would not be recalled.

58. One of the purposes of PUP was to contain the people cost liabilities which would be incurred in the event of a plant shutdown, while optimizing facility utilization.

59. By setting a cap on a plant's work force, Continental sought to limit future unfunded liabilities and to cause the plant manager to more effectively utilize all employees.

60. Prior to the time that Continental had developed a cap program, it had determined the level of manning required to produce the anticipated volume of business as follows: Starting in August or September, it would plan for the coming year which would consist of its sales department projecting what would be sold in the future year and the type and the nature of the product. Continental would then determine for each facility what was the required manpower to produce that volume. This was referred to as the required level of manning.

61. As part of Bell II, Continental's plant managers were instructed to fit the business to the available manning

in order to force increased utilization of employees, to improve competitiveness and to insure a secure business.

62. Baltimore, Patterson and Pittsburgh were selected as "concept development plants" for implementing the Bell System due to their mature work force, high overhead costs and potentially high unfunded liability costs.

63. In order to maintain the capped work force, Continental informed its plant managers that business volume could be shifted to plants where the work was necessary to keep employees with vested 70/75 benefits employed or shifted to plants with low unfunded liability.

64. The Bell System employed scattergraphs which were computer printouts depicting a plant's work force at a particular point in time. The scattergraphs were developed to describe the unfunded 70/75 and Rule of 65 liabilities that would be triggered at a given point in time. Thus, by looking at a scattergraph, a plant manager could ascertain the number of USW employees already vested for 70/75 and Rule of 65 benefits and those employees in the 2-year creep category.

65. This type of information had been regularly requested by the USW in preparation for negotiations leading to the Master Agreements.

66. The scattergraphs could not measure the effects of various levels of plant layoff due to plant shrink, i.e. attrition due to death, voluntary retirements or quit. Further, each plant's seniority practices, unwritten practices and understandings impacted on which employees could be laid off.

67. Another factor which impacted upon the plant manager's ability to ascertain which employees were in the vested or non-vested categories was Inter Plan Job Opportunities (IPJO). Under the Master Agreement, USW employees laid off from one Continental plant could transfer to another plant where they had preferential hiring

rights. Therefore, an employee assumed to be permanently laid off from one plant may in fact continue working in another plant. Under the Master Agreement, USW employees were entitled to preferential recall rights for a period of five years.

68. Continental often referred to the goals outlined in the Bell System as "liability avoidance." It had two aspects: (a) sheltering or keeping employed 70/75 qualified employees so that their employment was assured throughout their normal careers; and (b) preventing further employees from qualifying for 70/75 pensions.

69. On April 1, 1977, a liability avoidance tracking system was put into effect called "Red Flag." It was tied to the payroll system and designed to automatically generate a report when an employee designated as permanently laid off received a pay check.

70. A red flag would be generated whenever an employee received a pay check for actual hours worked, vacation or EEP payments.

V. Union Negotiations as to Plant Level Seniority

71. Under departmental seniority, each department is set up as a separate unit within the plant. As a particular department underwent a reduction in activity, the employees could bump other less senior employees only within that department. Thus, under departmental seniority, employees with great amount of seniority can be on layoff, while employees with shorter amounts of service are retained in an unaffected department.

72. Under plant-wide seniority, an employee could bump any employee throughout the plant who had less seniority.

73. The USW wanted to establish plant-wide seniority in both the steel and can industries for the following reasons:

a. It had been charged by the Equal Employment Opportunity Commission with discrimination based upon a departmental seniority system; and

b. It wanted to provide the maximum job security for its senior employees.

74. Continental wanted plant-wide seniority in order:

a. To allow it to retain its most senior employees who were the most skilled and loyal to the Company;

b. To retain employees with vested 70/75 and Rule of 65 pension benefits and thereby avoid triggering those benefits; and

c. To layoff the junior employees whose benefits had not yet vested.

75. On or about April of 1977, officials at Continental plants throughout the United States were considering changing their seniority practices.

76. The seniority rules and units were to be made by agreements between the plant manager and the local union at each plant.

VI. History Leading to the Rule of 65 Pension Benefit

77. The 70/75 pension benefit plan had been in effect since 1971.

78. On November 1, 1977, Continental agreed to provide its USW employees with a Rule of 65 pension benefit effective January 1, 1978, applicable to employees laid off on or after March 1, 1977.

79. The Rule of 65 was first formally proposed by the USW during the October, 1977 negotiations that led to the adoption of the Master Agreement.

80. The steel, aluminum and can industries follow what is known as "pattern bargaining," whereby the same terms, benefits and conditions adopted by the USW and any of these industries is usually requested in the other industries.

81. Prior to the commencement of the 1977 can industry negotiations, USW had negotiated and received a Rule of 65 benefit from the steel industry in April of 1977 and the aluminum industry in May of 1977.

82. Tom Duzak, the USW's negotiating representative for benefits, sent Continental's negotiating representatives a copy of the steel industry's agreement approximately a week after its conclusion in April of 1977. Further, the general outline of the steel industry agreement was reported in the Wall Street Journal which was read by Robert Adams, Director of Employee Benefits-Domestic Can Operations. Although the details of the Rule of 65 benefit had not been worked out at the conclusion of the steel industry negotiations, Continental knew that it involved a 20 year service requirement and would be triggered in the event of a plant shutdown or extended involuntary layoff.

83. Richard Luzzi, Human Relations Manager for Pittsburgh, and Adams, who headed the benefits committee for Continental during the October, 1977 negotiations, knew prior to the commencement of the can industry negotiations that the steel and aluminum industries had agreed upon a Rule of 65 benefit and expected the USW to demand a Rule of 65 benefit during the October negotiations with the can industry.

84. On August 29, 1977, Continental analyzed Rule of 65 benefit costs in relation to certain changes in plant alignment.

VII. The Pittsburgh Plant

85. The Pittsburgh plant, which was designated as Plant No. 72 (the Pittsburgh plant) was opened in 1947 as a consolidation of three other plants.

86. At the time the Pittsburgh plant was opened, metal cans were predominant in the industry and the plant was in a geographically desirable location because it was near the steel mills which produced the raw materials and close to its customer base.

87. During the 1970's, the Pittsburgh plant lost its customer base.

88. In the early 1970's and prior to 1975, due to decreased business, a number of the Pittsburgh plant's production lines were closed.

89. The Pittsburgh plant had a 3-piece line for producing steel cans. It never had a 2-piece line, nor did it have a line for producing aluminum cans.

90. In 1975, the Pittsburgh plant became a service center. A service center is a plant which produces parts for other plants. The Pittsburgh plant provided the following services: (a) making of ends for cans; and (b) doing lithography for other plants.

91. The Pittsburgh plant had one line for making pails, such as 5-gallon steel containers.

92. The pail line which had been in existence since the early 1950's was located on two floors. The shearer for cutting coils, which is the first operation, was at a considerable distance from the pail line. The finished product had to be carried on an overhead conveyor a considerable distance to the shipping ramp.

93. Prior to mid-1975, the pail line was part of the Pittsburgh plant. At that time, in order to determine whether the pail line was a profitable or unprofitable operation, it was made a separate plant and designated Plant No. 478. However, the Pittsburgh plant and the pail line continued to utilize the same seniority roster.

IX. Closing the Pail Line

94. Continental's accounting system used an estimated standard cost for materials and any increase or decrease from this standard cost was called a "variance" which was carried directly to the bottom line as a profit or loss.

95. For example, if the standard cost of materials for making a pail was \$1.00 and labor costs was \$2.00, the total cost was \$3.00. If the plant could obtain materials for 25 cents and its labor cost was still \$2.00, it showed an additional profit of 75 cents because it acquired the materials for 75 cents less than the standard cost of \$1.00.

96. During 1976 and 1977, the pail line was able to purchase materials which had been rejected for making cans. The material was acquired at a price substantially less than the standard cost, which resulted in a profitable variance. By 1978, Continental could no longer purchase materials at a variance.

97. For the year ending 1976, the pail line showed a profit of approximately \$600,000, of which \$300,000 was due to variance in material purchases. Thus, the true plant profit was only \$300,000 which did not include expenses and salaries of its two salesmen, overhead and administrative expenses.

98. For the year ending 1977, the pail line showed a profit of approximately \$300,000, of which \$345,000 was attributable to variance. Thus, the pail line really lost \$45,000 plus additional losses for sales and administrative expenses. The pail line's 1977 income was also impacted by a plant shutdown for five weeks due to an energy shortage.

99. In the spring of 1975, Bill Woodruff was made manager of the pail line and to enhance its business, two salesmen were employed solely for the pail line. During 1976, Woodruff instituted a number of measures to in-

crease productivity of the pail line and to reduce the number of people required to operate it.

100. Woodruff, as plant manager, was initially optimistic by the improvement that the steel pail line had shown since he had become plant manager. His optimism was initially shared by John Andreas, Manager of Manufacturing for General Packaging Division. However, Woodruff recognized that the profit level, which was approximately five percent, was not acceptable to him or Continental management. He also recognized that there was little that could be done to further increase the efficiency or profitability of the pail line if it remained in Pittsburgh.

101. In the early part of 1977, Woodruff prepared a report concerning the pail line and ways to improve its profitability. He considered three possibilities:

- a. An extended 2-shift operation;
- b. A limited 3-shift operation; and
- c. Moving to a new location.

102. Based on his analysis, moving to a new location had the greatest potential, particularly in view of the potential market in the southeast and eastern coasts.

103. During July and August of 1977, a number of meetings were held by various members of Continental's management concerning the pail line and Woodruff's recommendation that it be moved to a new location.

104. The factors which were considered by Continental management as to whether (a) the pail line should remain in Pittsburgh, (b) the pail line should be moved to a new location, and/or (c) the pail line should be closed were:

- a. The existing inefficiencies of the pail line due to its location and configuration which could not be improved;
- b. Profitability of the operation could not be improved. Further, the market projection was

stable to a 10 percent decline over the next 10 years;

c. Some erosion of the current steel volume into plastic;

d. The potential future business for sales lay in the southeastern United States;

e. The existing operation had a high labor cost due to the large number of people needed to operate the line because of its layout; and

f. To facilitate the Pittsburgh cap and shrink program.

105. The decision to close the steel pail line was made by Donald Bainton, Executive Vice President and General Manager of Continental Can Company USA, on August 29, 1977.

106. A motivating factor in Bainton's decision to close the pail line was to prevent employees from attaining eligibility for 70/75 and Rule of 65 benefits.

107. A motivating factor in Bainton's decision to close the pail line was the fact that it was an unprofitable business in Pittsburgh.

108. The decision to close the pail line was made before Continental decided to move the pail line.

X. Determining the Level of Manning and Cap at Pittsburgh

109. At a June 23, 1976, meeting at Hunt Valley, Bainton gave approval to Continental management to reduce the USW work force at Pittsburgh to 417 employees by the end of 1977.

110. On December 31, 1976, the Pittsburgh plant was capped at 574 USW employees. A cap was not set for

employees represented by the other two unions at the Pittsburgh plant.

111. On January 27, 1977, Louis Hoffman, Director of Facilities Utilization for Coastal Operations, indicated that the ideal cap, disregarding volume assumptions and other factors except unfunded people costs, would be 392 USW workers as of December 31, 1977, rather than the previous recommendation of 417 USW employees.

112. Prior to 1977, the Pittsburgh plant and the pail line had departmental seniority.

113. On or about April of 1977, Continental officials began meeting with USW officials to discuss implementing plant-wide seniority at the Pittsburgh plant.

114. Continental officials wanted plant-wide seniority at the Pittsburgh plant for the reasons set forth in fact finding No. 74.

115. Continental estimated that the savings under plant-wide seniority as opposed to departmental seniority in the event of a plant shutdown at Pittsburgh would be \$1.5 million.

116. Under plant-wide seniority, Continental could successfully remove the pail line from Pittsburgh without incurring tremendous expense.

117. At the time of the negotiations relating to local seniority rules and pay practices, officials of the local union knew that Continental was going to close the pail line.

118. In the summer of 1977, Stephen Rexford met with local union representatives at the Pittsburgh plant to negotiate plant-wide seniority.

119. In exchange for the local union at the Pittsburgh plant to agree to plant-wide seniority, Continental agreed to use its best efforts to keep employed all employees who had 20 years of service.

120. Pursuant to this agreement, the cap level for the year 1978 was increased from 417 to 472 which included 436 USW Production and Maintenance employees above the 20-year cap line and 36 skilled employees below the 20-year cap line.

121. The 20-year line was drawn under the name of Francis Conti.

122. On October 28, 1977, Continental and the local union formally agreed upon the implementation of plant-wide seniority which was to be effective November 1, 1977.

XI. Effect of Cap at Pittsburgh and Number of Employees Working

123. Following the setting of the cap of 472 USW employees as a result of the agreement as to plant-wide seniority, Continental brought additional business into the Pittsburgh plant and, in furtherance thereof, installed an UV lithographic equipment line, 10 additional minsters and presses for making aerosol ends.

124. With the additional business moved into the Pittsburgh plant, Continental projected that the Pittsburgh plant would only utilize 86.6 percent of its litho load and 79.2 percent of its coders.

125. In 1978, Continental transferred into the Pittsburgh plant sufficient work to keep its litho equipment running at full capacity.

126. During the 1977-78 time period, the Pittsburgh plant did not have sufficient business to employ all the USW employees above the cap line, and the average number of USW employees at work was as follows:

<u>1977</u>	<u>Avg. No. of USW employees at work</u>
July	367
August	363

September	381
December	227

1978

January	269
February	339
March	320
April	342
June	300
August	374

127. From 1972 until 1976, 185 USW employees were laid off.

128. Between January 23, 1976 and December 22, 1976, 35 USW employees were laid off.

129. Between June 24, 1977 and December 31, 1977, 73 USW employees were laid off; most of the layoffs occurred in November and December of that year.

130. Between January 1, 1978 and September 30, 1978, 15 USW employees were laid off.

131. Between February 1, 1979 and June 18, 1982, 33 USW employees were laid off.

132. The pail line was closed after Continental and the union signed the agreement negotiating the implementation of plant-wide seniority.

133. The closing of the pail line resulted in the elimination of 111 jobs at Pittsburgh.

134. All of the plaintiffs were laid off in accordance with seniority on a plant-wide basis pursuant to the agreement and, if replaced, were replaced by USW employees with greater seniority.

135. All recalls by Continental at the Pittsburgh plant were done in accordance with plant-wide seniority.

136. Plaintiff Albert Jakub was laid off on December 22, 1977, at which time he was 44 years old and had 19 years and 7 months of service with Continental.

137. Plaintiff Francis Humenik was laid off on April 21, 1978, at which time he was 41 years old and two weeks short of attaining 20 years of service.

138. Plaintiff Thomas Riley was laid off on April 21, 1978, at which time he was 39 years old and needed 16 days to attain 20 years of service.

139. Plaintiff Anthony Folino was laid off on January 1, 1978, at which time he was 44 years old and had 18 years and 8 months of service with Continental.

140. Plaintiff Robert Gavalik's layoff date was January 1, 1978, at which time he was 40 years old and had 19 years and 7 months of service.

141. A motivating factor in Continental's decision to cap the Pittsburgh plant and lay off individual and class plaintiffs was the desire to prevent further employees from attaining eligibility for 70/75 and Rule of 65 benefits.

142. A motivating factor in Continental's decision to cap the Pittsburgh plant and lay off individual and class plaintiffs was declining business conditions and a desire to more efficiently operate its plant.

143. Out of the 341 USW employees below Conti on the February, 1979 seniority list, 25 received 70/75 pension benefits and 25 received Rule of 65 benefits. Out of the 50 people, 17 had special skills,

CONCLUSIONS OF LAW

1. This Court has jurisdiction over this action pursuant to 29 U.S.C. §1132.

2. The Rule of 65 and 70/75 pension benefits are protected by ERISA. 29 U.S.C. §§1002(3)(1)(A); 1003(a)(1), (2).

Amaro v. Continental Can Co., 724 F.2d 747 (9th Cir. 1984); *McClendon v. Continental Group*, 602 F.Supp. 1492 (D.N.J. 1985).

3. A participant in an employee benefit plan is not required to exhaust grievance or arbitration procedures prior to bringing a statutory claim pursuant to §510 of ERISA, 29 U.S.C. §1140. *Barrowclough v. Kidder, Peabody & Co.*, 752 F.2d 923 (3d Cir. 1985); *Amaro v. Continental Can Co.*, *supra*; *Viggiano v. Shenango China Division of Anchor Hocking*, 750 F.2d 276 (3d Cir. 1984).

4. Continental did not violate §510 of ERISA in closing the steel pail line.

5. Continental did not violate §510 of ERISA in capping the Pittsburgh plant and laying off individual and class plaintiffs.

Date: September 24, 1985

cc: Counsel of record

/s/ ALAN S. BLOCH

United States District Judge

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
PENNSYLVANIA**

Civil Action No. 81-1519

ROBERT GAVALIK, *et al.*,

Plaintiffs,

vs.

CONTINENTAL CAN COMPANY,

Defendant.

Civil Action No. 82-1995

ALBERT J. JAKUB, *et al.*,

Plaintiffs,

vs.

CONTINENTAL CAN COMPANY, a member of Continental Can
Group, Inc.,

Defendant.

JUDGMENT ORDER

AND NOW, this 24th Day of September, 1985, upon consideration of the evidence presented by the parties at trial on the issue of liability and in accordance with this Court's Findings of Fact and Conclusions of Law filed herewith,

IT IS HEREBY ORDERED that judgment be, and hereby is, entered in favor of defendant, Continental Can Company, and against the individual and class plaintiffs.

/s/ ALAN S. BLOCH

United States District Judge

cc: Roslyn M. Litman and Thomas Betz, Esquires
1701 Grant Building, Pittsburgh, PA 15219.

James D. Morton and Samuel W. Braver, Esquires
57th Floor, U.S. Steel Building, Pittsburgh, PA 15219.

Paul Titus and Jon Hogue, Esquires
624 Oliver Building, Pittsburgh, PA 15222.

§ 1113. Limitation of actions

(a) ¹ No action may be commenced under this title with respect to a fiduciary's breach of any responsibility, duty, or obligation under this part, or with respect to a violation of this part, after the earlier of—

(1) six years after (A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission, the latest date on which the fiduciary could have cured the breach or violation, or

(2) three years after the earliest date (A) on which the plaintiff had actual knowledge of the breach or violation, or (B) on which a report from which he could reasonably be expected to have obtained knowledge of such breach or violation was filed with the Secretary under this title;

except that in the case of fraud or concealment, such action may be commenced not later than six years after the date of discovery of such breach or violation.

§ 1132. Civil enforcement

(a) Persons empowered to bring a civil action

A civil action may be brought—

(1) by a participant or beneficiary—

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

¹ So in original. No subsec. (b) has been enacted.

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;

(5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter; or

(6) by the Secretary to collect any civil penalty under subsection (i) of this section.

**(b) Plans qualified under Internal Revenue Code;
maintenance of actions involving delinquent contributions**

(1) In the case of a plan which is qualified under section 401(a), 403(a), or 405(a) of Title 26 (or with respect to which an application to so qualify has been filed and has not been finally determined) the Secretary may exercise his authority under subsection (a)(5) of this section with respect¹ [sic] to a violation of, or the enforcement of, parts 2 and 3 of this subtitle (relating to participation, vesting, and funding), only if—

(A) requested by the Secretary of the Treasury, or

(B) one or more participants, beneficiaries, or fiduciaries, of such plan request in writing (in such manner as the Secretary shall prescribe by regulation) that he

¹ So in original. Probably should be "respect".

exercise such authority on their behalf. In the case of such a request under this paragraph he may exercise such authority only if he determines that such violation affects, or such enforcement is necessary to protect, claims of participants or beneficiaries to benefits under the plan.

(2) The Secretary shall not initiate an action to enforce section 1145 of this title.

(c) Administrator's refusal to supply requested information

Any administrator (1) who fails to meet the requirements of paragraph (1) or (4) of section 1166 of this title with respect to a participant or beneficiary, or (2) who fails or refuses to comply with a request for any information which such administrator is required by this subchapter to furnish to a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the administrator) by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to \$100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper.

(d) Status of employee benefit plan as entity

(1) An employee benefit plan may sue or be sued under this subchapter as an entity. Service of summons, subpoena, or other legal process of a court upon a trustee or an administrator of an employee benefit plan in his capacity as such shall constitute service upon the employee benefit plan. In a case where a plan has not designated in the summary plan description of the plan an individual as agent for the service of legal process, service upon the Secretary

shall constitute such service. The Secretary, not later than 15 days after receipt of service under the preceding sentence, shall notify the administrator or any trustee of the plan of receipt of such service.

(2) Any money judgment under this subchapter against an employee benefit plan shall be enforceable only against the plan as an entity and shall not be enforceable against any other person unless liability against such person is established in his individual capacity under this subchapter.

(e) Jurisdiction

(1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, or fiduciary. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under subsection (a)(1)(B) of this section.

(2) Where an action under this subchapter is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found.

(f) Amount in controversy; citizenship of parties

The district courts of the United States shall have jurisdiction, without respect to the amount in controversy or the citizenship of the parties, to grant the relief provided for in subsection (a) of this section in any action.

(g) Attorney's fees and costs; awards in actions involving delinquent contributions

(1) In any action under this subchapter (other than an action described in paragraph (2)) by a participant, bene-

fiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.

(2) In any action under this subchapter by a fiduciary for or on behalf of a plan to enforce section 1145 of this title in which a judgment in favor of the plan is awarded, the court shall award the plan—

(A) the unpaid contributions,

(B) interest on the unpaid contributions,

(C) an amount equal to the greater of—

(i) interest on the unpaid contributions, or

(ii) liquidated damages provided for under the plan in an amount not in excess of 20 percent (or such higher percentage as may be permitted under Federal or State law) of the amount determined by the court under subparagraph (A),

(D) reasonable attorney's fees and costs of the action, to be paid by the defendant, and

(E) such other legal or equitable relief as the court deems appropriate.

For purposes of this paragraph, interest on unpaid contributions shall be determined by using the rate provided under the plan, or, if none, the rate prescribed under section 6621 of Title 26.

(h) Service upon Secretary of Labor and Secretary of Treasury

A copy of the complaint in any action under this subchapter by a participant, beneficiary, or fiduciary (other than an action brought by one or more participants or beneficiaries under subsection (a)(1)(B) of this section which is solely for the purpose of recovering benefits due such participants under the terms of the plan) shall be served

upon the Secretary and the Secretary of the Treasury by certified mail. Either Secretary shall have the right in his discretion to intervene in any action, except that the Secretary of the Treasury may not intervene in any action under part 4 of this subtitle. If the Secretary brings an action under subsection (a) of this section on behalf of a participant or beneficiary, he shall notify the Secretary of the Treasury.

(i) Administrative assessment of civil penalty

In the case of a transaction prohibited by section 1106 of this title by a party in interest with respect to a plan to which this part applies, the Secretary may assess a civil penalty against such party in interest. The amount of such penalty may not exceed 5 percent of the amount involved (as defined in section 4975(f)(4) of Title 26); except that if the transaction is not corrected (in such manner as the Secretary shall prescribe by regulation, which regulations shall be consistent with section 4975(f)(5) of Title 26) within 90 days after notice from the Secretary (or such longer period as the Secretary may permit), such penalty may be in an amount not more than 100 percent of the amount involved. This subsection shall not apply to a transaction with respect to a plan described in section 4975(e)(1) of Title 26.

(j) Direction and control of litigation by Attorney General

In all civil actions under this subchapter, attorneys appointed by the Secretary may represent the Secretary (except as provided in section 518(a) of Title 28), but all such litigation shall be subject to the direction and control of the Attorney General.

(k) Jurisdiction of actions against the Secretary of Labor

Suits by administrator, fiduciary, participant, or beneficiary of an employee benefit plan to review a final order

of the Secretary, to restrain the Secretary from taking any action contrary to the provisions of this chapter, or to compel him to take action required under this subchapter, may be brought in the district court of the United States for the district where the plan has its principal office, or in the United States District Court for the District of Columbia.

§ 1133. Claims procedure

In accordance with regulations of the Secretary, every employee benefit plan shall—

(1) provide adequate notice in writing to any participant or beneficiary whose claim for benefits under the plan has been denied, setting forth the specific reasons for such denial, written in a manner calculated to be understood by the participant, and

(2) afford a reasonable opportunity to any participant whose claim for benefits has been denied for a full and fair review by the appropriate named fiduciary of the decision denying the claim.

§ 1140. Interference with protected rights

It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, this subchapter, section 1201 of this title, or the Welfare and Pension Plans Disclosure Act [29 U.S.C.A. § 301 et seq.], or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this subchapter, or the Welfare and Pension Plans Disclosure Act. It shall be unlawful for any person to discharge, fine, suspend, expel, or discriminate against any person because he has given information or has testified or is about to testify in any inquiry or proceeding relating to this chapter or the Welfare and Pension Plans Disclosure Act. The provisions of

section 1132 of this title shall be applicable in the enforcement of this section.

§ 1144. Other laws

(a) Supersedure; effective date

Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

(b) Construction and application

(1) This section shall not apply with respect to any cause of action which arose, or any act or omission which occurred, before January 1, 1975.

(2)(A) Except as provided in subparagraph (B), nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities.

(B) Neither an employee benefit plan described in section 1003(a) of this title, which is not exempt under section 1003(b) of this title (other than a plan established primarily for the purpose of providing death benefits), nor any trust established under such a plan, shall be deemed to be an insurance company or other insurer, bank, trust company, or investment company or to be engaged in the business of insurance or banking for purposes of any law of any State purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment companies.

(3) Nothing in this section shall be construed to prohibit use by the Secretary of services or facilities of a State agency as permitted under section 1136 of this title.

(4) Subsection (a) of this section shall not apply to any generally applicable criminal law of a State.

(5)(A) Except as provided in subparagraph (B), subsection (a) of this section shall not apply to the Hawaii Prepaid Health Care Act (Haw.Rev.Stat. §§ 393-1 through 393-51).

(B) Nothing in subparagraph (A) shall be construed to exempt from subsection (a) of this section—

(i) any State tax law relating to employee benefit plans, or

(ii) any amendment of the Hawaii Prepaid Health Care Act enacted after September 2, 1974, to the extent it provides for more than the effective administration of such Act as in effect on such date.

(C) Notwithstanding subparagraph (A), parts 1 and 4 of this subtitle, and the preceding sections of this part to the extent they govern matters which are governed by the provisions of such parts 1 and 4, shall supersede the Hawaii Prepaid Health Care Act (as in effect on or after January 14, 1983), but the Secretary may enter into cooperative arrangements under this paragraph and section 1136 of this title with officials of the State of Hawaii to assist them in effectuating the policies of provisions of such Act which are superseded by such parts.

(6)(A) Notwithstanding any other provision of this section—

(i) in the case of an employee welfare benefit plan which is a multiple employer welfare arrangement and is fully insured (or which is a multiple employer welfare arrangement subject to an exemption under subparagraph (B)), any law of any State which regulates insurance may apply to such arrangement to the extent that such law provides—

(I) standards, requiring the maintenance of specified levels of reserves and specified levels of contributions, which any such plan, or any trust established under such a plan, must meet in order to be considered under such law able to pay benefits in full when due, and

(II) provisions to enforce such standards, and

(ii) in the case of any other employee welfare benefit plan which is a multiple employer welfare arrangement, in addition to this subchapter, any law of any State which regulates insurance may apply to the extent not inconsistent with the preceding sections of this subchapter.

(B) The Secretary may, under regulations which may be prescribed by the Secretary, exempt from subparagraph (A)(ii), individually or by class, multiple employer welfare arrangements which are not fully insured. Any such exemption may be granted with respect to any arrangement or class of arrangements only if such arrangement or each arrangement which is a member of such class meets the requirements of section 1002(1) and section 1003 of this title necessary to be considered an employee welfare benefit plan to which this subchapter applies.

(C) Nothing in subparagraph (A) shall affect the manner or extent to which the provisions of this subchapter apply to an employee welfare benefit plan which is not a multiple employer welfare arrangement and which is a plan, fund, or program participating in, subscribing to, or otherwise using a multiple employer welfare arrangement to fund or administer benefits to such plan's participants and beneficiaries.

(D) For purposes of this paragraph, a multiple employer welfare arrangement shall be considered fully insured only if the terms of the arrangement provide for benefits the amount of all of which the Secretary determines are guar-

anteed under a contract, or policy of insurance, issued by an insurance company, insurance service, or insurance organization, qualified to conduct business in a State.

(7) Subsection (a) shall not apply to qualified domestic relations orders (within the meaning of section 1056(d)(3)(B)(i) of this title).

(8) Subsection (a) of this section shall not apply to any State law mandating that an employee benefit plan not include any provision which has the effect of limiting or excluding coverage or payment for any health care for an individual who would otherwise be covered or entitled to benefits or services under the terms of the employee benefit plan, because that individual is provided, or is eligible for, benefits or services pursuant to a plan under title XIX of the Social Security Act [42 U.S.C.A. § 1396 et seq.], to the extent such law is necessary for the State to be eligible to receive reimbursement under title XIX of that Act.

(c) Definitions

For purposes of this section:

(1) The term "State law" includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State. A law of the United States applicable only to the District of Columbia shall be treated as a State law rather than a law of the United States.

(2) The term "State" includes a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this subchapter.

(d) Alteration, amendment, modification, invalidation, impairment, or supersedure of any law of United States prohibited

Nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law

of the United States (except as provided in sections 1031 and 1137(b) of this title) or any rule or regulation issued under any such law.

**MASTER
AGREEMENT**

(including Group Insurance Agreement)

between

CONTINENTAL CAN COMPANY, U.S.A.

and

UNITED STEELWORKERS
OF AMERICA, AFL-CIO

November 1, 1977 to February 15, 1981

**ARTICLE 13 GRIEVANCE
PROCEDURE**

13.1 Purpose

The purpose of this Article is to provide an opportunity for discussion of any request or complaint and to establish a procedure for the processing and settling of grievances, as defined in Section 13.2.

13.2 Definition

A grievance is defined as any difference between the Local Management and the Union or employees as to the interpretation or application of or compliance with this Agreement respecting wages, hours, or conditions of employment. Any dispute over whether a complaint is subject to these procedures shall be handled as a grievance in accordance with the procedures prescribed herein.

13.3 Grievance Committee

The Local Management will recognize a Grievance Committee chosen by the Union from among the employees,

of not more than ten (10) nor less than three (3) members, one of whom shall be the President of the Local Union, unless the Local Union determines otherwise. The size of the Committee presently in effect at each plant location will remain in effect unless changed by mutual agreement. When and if additional bargaining units are added to this Agreement, the number of Grievance Committeemen in such units within the above limits will be determined by mutual agreement.

The purpose of the Committee is to settle with the Local Management any grievance appealed to Step 2.

13.4 Department Stewards

The Local Management will continue to recognize Stewards in those plants where Stewards are presently recognized. In these plants there will be no more than one (1) Steward on each shift in each recognized department.

The Local Union agrees to give the Local Management in writing the names of the persons who will serve as members of the Grievance Committee and of Stewards, if any, and the departments they represent. The Local Union will keep the list up-to-date.

13.5 Time Off for Grievance Work

The Grievance Committee or Shop Stewards will have reasonable time off from their regular work to handle grievances within their own departments. They will not lose any pay for this time off.

Grievance Committee members will also have time off from their regular work to attend Grievance Committee meetings with Management, investigate and prepare grievances, or do anything else the Local Management may ask them to in connection with the settlement of grievances. They will not lose any pay for this time off.

When a Committeeman or Steward has to leave his place of work to handle grievances in his own or another

department, he must get permission from his department Supervisor. When he goes into another department, he must obtain permission of the Supervisor of the department before talking with any employees at their work. This permission shall not be unreasonably withheld.

13.6 Procedure

At all steps in the grievance procedure the grievant and/or the Union representative should disclose to the Company representatives a full and detailed statement of the facts relied upon, the remedy sought, and the provisions of the Agreement relied upon. In the same manner, Company representatives should disclose all the pertinent facts relied upon by the Company. If the Company representative shall consider a grievance at any step to be without merit, he shall clearly state the reasons for denial in the grievance answer.

If any grievance arises, every effort will be made to settle the matter quickly, under the procedure outlined below. The Company agrees it will not lock out the employees and the Union agrees there will be no work stoppage or interference with work.

13.7 Steps in Grievance Procedure

Step 1

(a) Within thirty (30) calendar days after wrong complained of was supposed to have happened or started to exist (but if the employee did not find out about the wrong immediately, he will be allowed thirty (30) calendar days after he reasonably should have found out about it to file the grievance) the employee, with a Grievance Committeeman or Steward, or if he so desires, alone, talks over the grievance with his Supervisor in a sincere effort to settle the problem. This does not preclude the handling of group grievances. The Supervisor must then give his oral answer to the grievance before the end of the second work day after the discussion.

If the Supervisor and the grievance representative, after full discussion, feel the need for aid in arriving at a solution, they may by agreement, invite an additional Company and/or Local Union representative from the plan as may be necessary to participate in further discussion, but such additional participants shall not relieve the Supervisor and grievance representative from responsibility for solving the problem. However, if additional assistance is requested and agreed to such meeting shall be held within three (3) workdays unless the Step 1 representative agrees to an extension of time which will not exceed an additional 3 workdays.

The foregoing procedure, if followed in good faith by both parties, should lead to a fair and speedy solution of most of the complaints arising out of the day-to-day operations of the plant.

(b) If the Supervisor's oral answer is not satisfactory to the employee and the grievance representative determines that the grievance is meritorious, the grievance representative shall put the grievance into writing on forms provided by the Company. The written grievance shall be dated and signed by the grievance representative and employee (or other employees affected). It shall include a statement of the facts relied upon, the Section or Sections of the Agreement believed to have been violated and the corrective action sought.

The written grievance must be presented to the Supervisor for his further consideration before the end of the second workday after he has given his oral answer. The Supervisor shall give his written answer to the grievance representative within 2 workdays after receipt of the written grievance.

(c) Grievances resolved at Step 1 shall be considered resolved without precedent and shall not be used in the discussion of other grievances or arbitration cases.

Step 2

If the written answer at Step 1 is not satisfactory, the Chairman of the Committee shall present the Grievance to the Plant Human Resources Supervisor or other designated Local Management representative within five (5) workdays after receipt of the Supervisor's written answer. The Plant Manager or his designated representative shall meet with the Grievance Committee within ten (10) workdays after the grievance has been appealed to Step 2 to consider the grievance.

At this step the representatives may by agreement invite to participate in the discussion such additional representatives from the plant as may be available for aid. The attendance of such persons will be limited to the time required for their testimony. Such additional participants shall not relieve the grievance representative and the Plant Manager or his designated representative from responsibility for solving the problem. The Plant Manager will give his answer in writing setting forth the reasons for the Company's position within five (5) workdays after the discussions are completed.

Step 3

If the answer to Step 2 is not satisfactory, then within ten (10) working days after the Grievance Committee has received the Plant Manager's answer, the staff representative of the Union will advise the Company's Division Human Resources Office by letter (with a copy to the Plant Manager and Local Union) of his desire to appeal. Discussion of the appealed grievance shall take place at the earliest date of mutual convenience following receipt of the notice of appeal, but not later than 30 days thereafter unless either party shall request in writing, with reasons therefore, that the meeting take place at a later date and the other party agrees. The staff representative of the Union and Grievance Committee will meet with the Company's Division Human Resources Representative and Plant

Manager or his designated representative. The Company's Division Human Resources Representative will give his answer in writing no later than seven (7) working days after the hearing.

Step 4

If the answer to Step 3 is not satisfactory then within 20 calendar days after receiving the written answer of the Company's Division Human Resources Representative, the staff representative of the Union will make an appeal in writing to the Permanent Arbitrator, with a copy to the Company's Division Manager of Human Resources, the Plant Manager, Local Grievance Committee and to the Union's Arbitration Department. Where grievances involve a job classification question, in accordance with Section B3.6(e) the matter will first be referred to Director of Salary Division of United Steelworkers of America and the Company's appropriate Head Office department.

Within 30 calendar days after receipt of the Union's letter appealing the grievance to arbitration, the Permanent Arbitrator shall notify the Step 3 representatives of a date for a hearing after consultation with the designated representatives of the Union's Arbitration Department and the Company's Head Office.

The Arbitrator shall make a decision within 30 calendar days after the arbitration hearing is completed.

A grievance appealed to any step of the procedure set forth herein shall not be further discussed or settled in any prior step except by mutual agreement of the designated representatives in the step to which such grievance has been appealed.

13.8 Observance of Time Limits

By mutual agreement and for good cause, reasonable extensions of time will be given either party in writing at any step in the Grievance Procedure. Any grievance that is not appealed to the next step within the specified time

limits or extension of time limits will be considered settled on the basis of the last decision given. Any grievance that is not answered by the Company within the time limits as specified in Step 1, will be considered as having automatically moved to Step 2 of the Grievance Procedure.

The Company shall not have the right to invoke the time limits under this Agreement to disallow a grievance because of late appeal unless the Union Representative responsible for advancing the case to the next step is first notified of its intention at least three (3) working days (72 hours) prior to the effectiveness of such disallowance.

Any Grievance that is not answered in writing or extended as provided above within the time limits specified at Step 2 and Step 3 of the Grievance Procedure shall be considered settled in favor of the Union with an appropriate remedy. The Union shall not invoke the time limits under this Agreement unless the Company representative responsible for answering the Grievance is notified in writing at least three (3) working days (72 hours) prior to the effectiveness of such forfeiture.

13.9 Minutes and Grievance Record

Local Management shall keep minutes at Step 2 which shall be jointly signed by the Chairman of the Grievance Committee and Plant Manager or his designated representative.

Minutes shall conform to the following outline:

- a. Date and place of meeting.
- b. Names and positions of those present.
- c. Identifying number and descriptions of each grievance discussed.
- d. Statement of facts agreed to by the Step 2 representatives.
- e. Statement of facts known to be in dispute.

- f. Brief statement of Union position.
- g. Brief statement of Company position.

Step 2 meeting minutes shall be submitted to the Chairman of the Local Union Grievance Committee within five (5) workdays following the day the meetings close. If the Chairman of the Local Grievance Committee is not in agreement with the minutes, he must within five (5) days indicate his exact exceptions and these, unless cleared up, will be made part of the minutes.

The written grievance, Supervisor's Step 1 written answer, Step 2 minutes and the Plant Manager's Step 2 answer shall comprise the grievance record.

13.10 Regular Arbitration

The parties shall agree upon the selection of a single Arbitrator whose remuneration shall be on a per diem fee basis. In the event of the resignation, incapacity or death of the Arbitrator, the parties shall as promptly as possible mutually designate a successor. Either party may, in its discretion, terminate the services of the Arbitrator and the parties will agree upon the selection of a successor. The parties shall arrange for such associate Arbitrators as may be necessary. If in the opinion of the District Director of the Union and the Division Manager of Human Resources a special situation exists which calls for immediate arbitration and the permanent Arbitrator is not available, they may request the International Union and the Company to designate another Arbitrator to hear and decide such case in accordance with the provisions of this Agreement.

The Arbitrator shall not have jurisdiction to alter or amend in any way the provisions of this Agreement and his decision must be in accordance with the terms of this Agreement. His decision will be binding on the parties.

The Company and the Union will share equally the Arbitrator's fees and expenses, and any clerical or stenographic expense that both agree to.

Post-hearing briefs shall not ordinarily be filed. However, in a given case either or both parties with the consent of the Arbitrator or at his request may submit post-hearing briefs, if he deems such briefs necessary. Such briefs shall not result in an extension of the time limits for the issuance of a decision.

13.11 Expedited Arbitration

Notwithstanding any other provision of this Agreement, the following Expedited Arbitration Procedure is designed to provide prompt and efficient handling of routine grievances.

The Expedited Arbitration Procedure shall be implemented in light of the circumstances existing in each plant, with due regard to the following:

1. Panels of arbitrators shall be designated for each agreed to area by the headquarters representatives of the parties. When such representatives agree that the panel for any area is ready to function, the local parties and appropriate Step 3 Union and Company representatives will be informed so that the procedure may be utilized. A number of arbitrators sufficient to insure the successful operation of this procedure shall be selected. Their expenses and fees shall be borne equally by the Company and the Local Union.
2. This procedure shall be as follows:
 - a. Within ten (10) days after receipt of the Step 2 answer the Staff Representative shall determine which grievances shall be referred back to the Step 2 representatives for final disposition. Prior to advising the Local Union Grievance Committee of his/her determination of grievances remanded to Step 2 for disposition, the Staff Representative will so notify the

Company's Step 3 Representative in writing. Should the Step 3 Representative of the Company deem that the issue should not be referred to Expedited Arbitration in accordance with Paragraph 5b, he shall request a review of the issue by the Union's Arbitration Department and the Industrial Relations/Human Resources Department of the company's Head Office. If the parties cannot conclude that the issue is appropriate for Expedited Arbitration, the issue will be returned to Step 3 of the grievance procedure.

If the Staff Representative does not send a grievance back to Step 2, that grievance shall proceed to Step 3 as provided in Section 13.7. Any referral of grievances back to Step 2 by the Staff Representative shall be confirmed in writing to the Company's Step 3 Representative with copies to the Local Union and the local plant management. The Step 3 Representatives may mutually agree to refer back any grievance discussed in a Step 3 grievance meeting.

b. As to any grievance referred back to the Step 2 representatives by the Staff Representative, the chairman of the local union grievance committee may appeal it to the Expedited Arbitration Procedure by notifying the Plant Manager within seven (7) days of receipt of the referral from the Staff Representative. The local plant representatives shall then arrange for handling in Expedited Arbitration as follows:

The list of members of the panel applicable to that plant shall be maintained alphabetically to be used by fixed rotation. The next panel members shall be contacted and requested to serve on the case or cases designated for Expedited Arbitration at a time and place agreed upon by the Step 2 representatives. The date for the hearing shall be within ten (10) days of the appeal unless an extension of time is mutually agreed by the Step 2 representatives.

3. Grievances shall be presented in the Expedited Arbitration Procedure by a previously designated representative of the Local Union and a designated representative of local plant management. Attendance of other persons at the arbitration hearing shall be limited to those who have personal knowledge of the grievance being presented.

4. The hearings shall be conducted in accordance with the following:

a. The hearing shall be informal.

b. No briefs shall be filed or transcripts made.

c. There shall be no formal evidence rules.

d. Arbitration Awards cited by either party will be limited to decisions of the Permanent Arbitrator between the Company and the Union.

e. The arbitrator shall have the obligation of assuring that all necessary facts and considerations are brought before him by the representatives of the parties. In all respects, he shall assure that the hearing is a fair one.

f. If the arbitrator or the parties conclude at the hearing that the issues involved are of such complexity or significance that the case should require further consideration by the parties, the case shall be referred back to Step 3 of the grievance procedure and it shall be processed as though appealed on such date. The arbitrator shall render his written decision within two (2) workdays following the date of the hearing. His decision shall be based on the facts presented by the parties at the hearing, and shall include a brief written explanation of the basis for his conclusion. These awards will not be cited as a precedent in any discussion of any other grievances at any step of the grievance procedure or in subsequent arbitration. The

authority of the arbitrator shall be the same as that provided for in Article 13.10 of the Master Agreement.

5. a. Time limits referred to in this Article exclude Saturdays, Sundays and holidays and may be extended by mutual agreement of the parties involved in each particular phase of the procedure.

b. Grievances subject to this Expedited Arbitration procedure must be confined to issues which do not involve novel problems and which have limited contractual significance or complexity.

c. Decision in Expedited Arbitration shall be consistent with the decisions of the Permanent Arbitration in cases relating to the Company and the Union.

d. Duplicate originals of each decision shall be furnished by the arbitrator to the respective representatives presenting the grievance with copies to:

- (1) Local Union Representative
- (2) Union Staff Representative
- (3) Union's International Office (Arbitration Department)
- (4) Plant Manager
- (5) Company's Division Manager of Human Resources
- (6) CCC-USA—Department of Human Resources

13.12 Retroactivity of Awards and Settlements

Arbitration awards of grievance settlements will not be made retroactive beyond the date of the occurrence or non-occurrence of the event upon which the grievance is based. In no event, however, shall the settlement be earlier than thirty (30) days prior to the date on which the grievance

ance is filed except as provided for in Section 9.10 and Section B3.6 (Description and Classification of New or Changed Jobs) of this Agreement.

13.13 Right to Process Grievance for Legal Heirs

In the event an employee dies, the Union may process on behalf of his legal heirs any claims he would have had relating to any monies due under any provision of this Agreement.

13.14 Pending Grievances

Any grievance which was presented in writing prior to the date of this Agreement and is in process of adjustment under the terms of the Master Agreement previously in effect, will continue to be processed under the terms of the prior Master Agreement and settled in accordance with it for the period prior to the date of this Agreement, and for any subsequent period in accordance with the applicable provisions of this Agreement.

Any grievance which is presented in writing on or after the date of this Agreement which is based on the occurrence or non-occurrence of an event prior to the date of this Agreement shall be processed in accordance with the grievance procedures of this Article 13. Such grievance shall be settled in accordance with the applicable provisions of the prior Master Agreement for the period prior to the date of this Agreement, and for any period thereafter in accordance with the applicable provisions of this Agreement.

13.15 Prior Proposals

The proposals made by each party with respect to changes in the labor agreements and the discussions had

with respect thereto shall not be used, or referred to, in any way during or in connection with the arbitration of any grievance arising under the provisions of such agreements.

This shall not limit in any respect the right of either party to express at the arbitration hearing its position or its intent or interpretation with regard to the meaning of any provisions of the labor agreement.

ARTICLE 23 PENSIONS

The Company agrees to modify the Pension Plan in accordance with the revised Pension Agreement dated November 1, 1977.

YOUR CONTINENTAL PENSION PLAN

ESTABLISHED PURSUANT TO AGREEMENT BETWEEN THE UNITED STEELWORKERS OF AMERICA, AFL-CIO, 5 GATEWAY CENTER, PITTSBURGH, PENNSYLVANIA 15222

AND

THE CONTINENTAL CAN COMPANY, U.S.A.
5745 RIVER ROAD
CHICAGO, ILLINOIS 60631

EFFECTIVE NOVEMBER 1, 1977

EXPIRES FEBRUARY 14, 1981

YOUR CONTINENTAL PENSION PLAN

**Part of Your
CONTINENTAL PROGRAM OF PROTECTION
USW MASTER AGREEMENT**

SECTION 1

INTRODUCTION

If you are a member of the bargaining unit as defined in the Master Agreement with the Union, you are eligible to

become a member of the Company's pension plan which provides the benefits described in this Booklet (Plan). If so, you may not be a member of any other Company pension or retirement plan.

The Plan's purpose is to provide for the payment of pension and disability benefits upon retirement or termination of employment with the Company. Together with Social Security and income from personal savings, the Plan plays an important part in providing you with needed financial security after you stop working. The Company pays the *full* cost of all Plan benefits and you are not asked to contribute.

The Company Pays The Full Cost

The Plan has been amended to conform to the provisions of the Employee Retirement Income Security Act of 1974 (ERISA) and any differences between the provisions of the Plan and the present or future requirements of ERISA will be deemed to be resolved in conformance with the requirements of ERISA. Except to the extent preempted by ERISA, it is further intended that the provisions of the Plan conform to the age discrimination requirements under the Age Discrimination in Employment Act of 1978 (ADEA) and the regulations thereunder and applicable state and local law and any differences between the provisions of such requirements shall be deemed to be resolved in conformance with such requirements.

Certain benefits under this pension plan are insured by the Pension Benefit Guaranty Corporation. For additional information, please refer to Section 6 of this Booklet.

SECTION 6

OTHER IMPORTANT FACTS ABOUT THE PLAN

APPEALS PROCEDURE

Any differences that may arise between you and the Company concerning your application for, your entitlement to or the amount of payment of a lump sum retirement allowance, pension or deferred benefit, may be taken up as a grievance in accordance with the applicable provisions of the Master Agreement beginning as step 3 of the Grievance Procedure, except as provided in the Medical Review Procedure described in this Booklet.

If any such grievance is appealed to arbitration in accordance with such provisions, then the arbitrator, insofar as is necessary to the determination of such grievance, has authority only to interpret and apply the provisions of the Pension Agreement. He does not have authority in any way to alter, add to or subtract from any of such provisions, and his decision on any such grievance which is properly referred to him is binding on you, the Company, and the Union. The Company and the Union share equally the costs of the arbitrator's charge and fees, along with any other expenses which they may mutually agree to incur.

REEMPLOYMENT

All payments of any pension or deferred benefit will cease in the event you are reemployed by the Company, beginning with the next monthly payment following your reemployment.

Any option election you made will be suspended during the period of reemployment but will remain as an election on file upon subsequent retirement. You may revoke any option any time before your subsequent retirement subject to the applicable requirements.

Your rights to pre-retirement coverage will be the same as those of any other active employee with same age and service.

When you again leave the Company, the amount of any pension or deferred vested benefit will be based on your previous credited service plus any additional credited service accumulated after reemployment, but not beyond age 72.

IDENTIFICATION NUMBERS OF THE PLAN

The identification number assigned to the Plan by the Internal Revenue Service for tax purposes is EIN 13-0597410. The number assigned to the Plan by the Company in accordance with the Internal Revenue Service instructions is 002.

ADMINISTRATION OF THE PLAN

The Plan is administered by a General Pension Board of at least three persons chosen by the Company's Board of Directors.

The General Pension Board supervises the operation of the Plan—interpreting its provisions, arranging for retirements and authorizing all benefit payments. You can contact the General Pension Board at The Continental Group, Inc., One Harbor Plaza, Stamford, Connecticut 06902 (203) 964-6100.

The Secretary of the Company who is located at the above address has been designated as agent for service of legal process.

INVESTMENT OF FUNDS

The Plan is trustee. This means that Company contributions go into a trust fund held by a trustee in accordance with the terms of a trust agreement. The trustee is The Northern Trust Company, 50 South LaSalle Street, Chi-

cago, Illinois 60675. The assets of the fund are invested and used to pay benefits to members and their survivors. Plan records to members and their survivors. Plan records are maintained on a calendar-year basis, with the last day of the Plan year falling on December 31.

INSURED BENEFITS

This Plan is a defined benefit plan—which means that benefits are paid out according to a specified formula. Benefits under this Plan are insured by the Pension Benefit Guaranty Corporation (PBGC) if the Plan terminates. Generally, the PBGC guarantees most vested normal age retirement benefits, early retirement benefits, and certain disability and survivor's pensions. However, the PBGC does not guarantee all types of benefits under covered plans, and the amount of benefit protection is subject to certain limitations.

The PBGC guarantees vested benefits at the level in effect on the date of plan termination. However, if benefits have been increased within the five years before plan termination, the whole amount of the plan's vested benefits or the benefit increase may not be guaranteed. In addition, there is a ceiling on the amount of monthly benefit that the PBGC guarantees, which is adjusted periodically.

For more information on the PBGC insurance protection and its limitations, ask the General Pension Board or the PBGC. Inquiries to the PBGC should be addressed to the Office of Communications, PBGC, 2020 K Street, N.W., Washington, D.C. 20006. The PBGC Office of Communications may also be reached by calling (202) 254-4817.

OTHER INFORMATION

As a member of the Continental Pension Plan you are entitled to certain rights and protections under the Employee Retirement Income Security Act of 1974 (ERISA).

You are entitled to:

- examine, without charge, at your closest Human Resources or Industrial Relations Office, all Plan documents, including The Continental Group, Inc. Basic Non-Contributory Pension Plan and copies of all documents filed with the U.S. Department of Labor, such as the annual report (Form 5500). You will also receive copies of any other reports that ERISA requires.
- obtain copies of all Plan documents and other Plan Information upon written request, at a reasonable charge per page, by writing to:

Secretary, General Pension Board
The Continental Group, Inc.
One Harbor Plaza
Stamford, Connecticut 06902

When writing to the General Pension Board, please include your name, Social Security number, location at which you are employed or where you last worked and the specific Plan document you are requesting.

- once each year, receive a statement of your accrued pension or deferred vested benefit (if any), and the earliest date on which you will become eligible for a deferred vested benefit. This statement may be obtained by writing to the Secretary of the General Pension Board.

In order to calculate your pension estimate, we will need the following information

- Name, Social Security number, location where you are working.
- Sex and date of birth.
- Date hired plus years of regular continuous service with the Company.
- Job class or pay rate.

- W-2 earnings for the last 10 years.
- Spouse's date of birth.

If you do not have this information available, you should contact your Human Resources representative who will make the request for you.

In addition to creating rights for you, ERISA also imposes certain obligations upon those individuals who are responsible for the operation of your Pension Plan. These persons are referred to as "fiduciaries." Fiduciaries are required to act in the best interest of Plan members and exercise prudence in the performance of their duties. Fiduciaries who violate the law may be removed and required to make good any losses they have caused the Plan.

The Company may not fire you or discriminate against you to prevent you from obtaining a pension or deferred vested benefit to which you are entitled under the Plan or keep you from exercising your rights under ERISA.

If your claim for a pension or benefit is denied, you are entitled to receive a written explanation of the reason for the denial. You also have a right to have your claim reviewed as outlined in the Appeals Procedure Section of this Booklet.

If you are improperly denied a pension or deferred vested benefit or, if the material which you have requested is not received within 30 days of your request, you have a right to file suit. In such a case, the court may require the General Pension Board to provide the materials and pay you up to \$100 a day until you receive them, unless the materials were not sent to you because of matters beyond the control of the General Pension Board. If Plan fiduciaries are misusing the Plan's money, you also have a right to file suit in a federal court or request assistance from the U.S. Department of Labor.

If you have any questions about this statement or your rights under ERISA, you should contact the Secretary of the General Pension Board or the nearest Area Office of

the U.S. Labor-Management Service Administration, Department of Labor.

UNITED STATES

PENSION AGREEMENT

Details of the Pension Plan referred to in Article 23 of the Master Agreement dated November 1, 1977.

Pension Agreement entered into this 1st day of November, 1977 between Continental Can Company, U.S.A., a member of The Continental Group, Inc. (hereinafter referred to as the "Company") and the United Steelworkers of America, (hereinafter referred to as the "Union") to become effective as of November 1, 1977.

SECTION 2. PENSION PLAN

2.0 The Company agrees to provide, through this amended Pension Plan, the benefits hereinafter specified in this Agreement.

Any differences between the provisions of the Plan and the present or future requirements of the Employee Retirement Income Security Act of 1974 (ERISA) shall be deemed to be resolved in conformance with the requirements of ERISA.

A member of this Plan before January 1, 1976, shall continue to be covered by the Plan on and after such date. After January 1, 1976, an Employee shall become a member on the January 1 following (a) the Employee's last date of hire or, (b) attainment of the age of 24 years, which is later.

After the effective date of this Agreement, no Employee covered by this Agreement shall be a member of any other pension or retirement plan of the Company.

SECTION 7. MISCELLANEOUS

- 7.0 As or before Employees retire during the term of this Agreement, the Company will or shall have paid into a trust or trusts at least an amount of monies which in the aggregate and on a sound actuarial basis shall be estimated to be sufficient to pay the pensions or deferred benefits which shall have been granted as provided in this Agreement.
- 7.1 (a) If, during the term of this Agreement, any differences shall arise between the Company and any Employee who shall be an applicant for a lump sum retirement allowance, pension or deferred benefit as provided in this Agreement, as to whether or not such Employee is entitled to or as to the amount of such lump sum retirement allowance, pension or deferred benefit, such differences except as provided in paragraph 3.7 may be taken up as a grievance in accordance with the applicable provisions of the Master Agreement beginning at Step 3 of the Grievance Procedure.
- (b) If any such Grievance shall be appealed to arbitration in accordance with such provisions, then the arbitrator, insofar as shall be necessary to the determination of such grievance, shall have authority only to interpret and apply the provisions of this Agreement, but he shall not have authority in any way to alter, add to or subtract from any of such provisions, and his decision on any such grievance which shall properly have been referred to him shall be binding on the Company, the Union, and the Employee concerned therein.
- (c) The Company and the Union shall share equally the costs of the arbitrator's charge and fees along with any other expenses which it may be mutually agreed to incur.

- 7.2 Each application for a benefit under this Agreement shall be in writing on a form provided by the Company. The Company may require any applicant to furnish to it such reasonable, necessary information as the Company may require.
- 7.3 Assignment, pledge, or encumbrance of any kind, of lump sum retirement allowances, pensions or deferred benefits will not be permitted or recognized under any circumstances, nor shall they be subject to attachment or other legal process for the debts of Pensioners.
- 7.4 The Company and the Union shall establish a Joint Committee on Pensions consisting of not more than 10 members, half of whom shall be designated by the Company and half of whom shall be designated by the Union. Such Committee shall be furnished annually a report regarding the progress of the operation of the Pension Plan insofar as it affects the Employees. From time to time during the term of this Agreement such Committee shall be furnished such additional information as may be reasonably required for the purpose of enabling it to be properly informed concerning the operation of the Pension Plan insofar as it affects the Employees.
- 7.5 (a) Neither any pension becoming payable by the Company during the term of this Agreement, nor any survivor benefit becoming payable by the Company during the term of the Group Insurance Agreement, nor any deferred benefit or right thereto pursuant to paragraph 3.6 of this Agreement, shall be discontinued or reduced except as provided in the Agreement or the Group Insurance Agreement, notwithstanding expiration or termination of this Agreement or the Group Insurance Agreement.
- (b) Notwithstanding expiration or termination of any prior Pension Agreement or this Agreement, any prior Pension Agreement between the Company

and the Union shall continue in effect to the extent necessary to provide in full the pensions or survivor benefits (or deferred benefits) of Employees or survivors otherwise qualifying under such prior Agreement but not this Agreement, including the payment of any deferred benefits the right to which was established initially during the term of such prior Agreement.

- (c) The monthly amount of any pension (not a deferred benefit) otherwise payable under a prior Pension Agreement between the parties hereto to a Pensioner who retired prior to February 15, 1974 shall be increased \$15.00 commencing with the month of March 1978.
- (d) The monthly amount of any pension (not a deferred benefit), otherwise payable under the immediately preceding Pension Agreement between the parties hereto to a Pensioner retired on or after February 15, 1974 and prior to March 1, 1977, shall be increased commencing with November 1977 to include the supplement payable to the Pensioner under paragraph 9.222 of the immediately preceding Master Agreement between the parties hereto as of October 31, 1977, and, if the increase was less than \$15.00, shall be further increased commencing with the month of March 1978 to increase such monthly amount of pension by a total, when combined with the increase for such supplement, of \$15.00 per month.
- (e) The Monthly amount of any pension (not a deferred benefit) otherwise payable under the immediately preceding Pension Agreement between the parties hereto to a Pensioner who retired on or after March 1, 1977 shall, in lieu of any supplement payable under paragraph 9.222 of the immediately preceding Master Agreement, be increased as of the re-

spective effective dates in accordance with the Basic Pension Amounts and monthly supplements, if applicable, set forth in paragraphs 4.0(c), 4.1 and 4.3 (such increases in the pension to be made prior to reduction for joint and survivor payments under paragraph 4.11, 4.13 or 4.14 or optional form of pension under paragraph 4.12 or a reduced early pension under paragraph 4.2).

- (f) The monthly amount of any deferred benefit otherwise payable under the immediately preceding Pension Agreement between the parties hereto to a person who broke regular continuous service on or after March 1, 1977 with entitlement to a deferred benefit shall be increased to reflect the applicable Basic Pension Amounts set forth in paragraph 4.0(c) (such increase in the deferred benefit to be made prior to reduction for joint and survivor payments under paragraph 4.11).

7.6 The Company will advise each Employee at the time of delivery of his first check that the benefit is pursuant to this Agreement between the Company and the Union.

SECTION 8. RIGHTS AND OBLIGATIONS AS TO BARGAINING

8.0 During the term of this Agreement, neither the Union nor any of the Employees shall:

- (a) Make any request that this Agreement be changed in any respect or terminated, or that the amount which the Company is required by the provisions of the Pension Plan and of this Agreement to pay or provide for lump sum retirement allowances, pensions or deferred benefits for the Employees, be increased; or
- (b) Engage or continue to engage in or in any manner encourage or sanction any strike or other action

which shall interfere with work or production at any of the plants of the Company specified in the Master Agreement for the purpose of securing any such increase or any such change or any other action with respect to lump sum retirement allowances, pensions or deferred benefits.

During the term of this Agreement, the Company shall not have any obligation to negotiate or bargain with the Union with respect to any of the matters covered by clauses (a) and (b) of this paragraph 8.0

During the term of this Agreement, the Company shall not change or request any change in this Agreement or engage in or sanction any lockout for the purpose of securing such change.

**1986 APPELLATE CASES INVOLVING ERISA AND
EXHAUSTION/ARBITRATION**

Alfarone v. Bernie Wolff Const. Corp., 788 F.2d 76 (2nd Cir.), cert. denied, 107 S. Ct. 316 (1986)

Anthuis v. Colt Industries Operating Corp., 789 F.2d 207 (3d Cir. 1986)

Dale v. Chicago Tribune Co., 797 F.2d 458 (7th Cir. 1986), cert. denied, 107 S. Ct. 954 (1987).

Jones v. Ashland Oil, Inc. 793 F.2d 1292 (Table) (unpublished Disp.) (6th Cir. 1986) (Available on Westlaw, CTA Library)

Moldovan v. Great Atlantic & Pacific Tea Co., Inc., 790 F.2d 894 (3d Cir.), petition for cert. filed (Aug. 11, 1986)

Molnar v. Wibberly, 789 F.2d 244 (3d Cir. 1986)

Zipf v. American Tel. & Tel. Co., 799 F.2d 889 (3d Cir. 1986)

1986 DISTRICT COURT CASES INVOLVING ERISA AND EXHAUSTION/ARBITRATION

Allen v. American Home Foods, Inc., 644 F. Supp. 1553 (N.D. Ind. 1986)

Armstrong v. Bert Bell NFL Player Retirement Plan & Trust Agreement, 646 F. Supp. 1094 (D. Colo. 1986)

Baron v. U.S. Steel Corp., 649 F. Supp. 537 (N.D. Indiana 1986)

Bemis v. Hogue, 635 F. Supp. 1100 (E.D. Mich. 1986)

Boesl v. Suburban Trust & Sav. Bank, 642 F. Supp. 1503 (N.D. Ill. 1986)

Borowski v. Vitro Corp., 634 F. Supp. 252 (D.C. Md. 1986)

Bower v. The Bunker Hill Co., —F.R.D. —, No. C-82-412RJM & C-85-87RJM (E.D. Wash. Feb. 4, 1986) (Available on Westlaw, DCT Library)

Chicago Painters & Decorators Pension, Health & Welfare & Deferred Savings Plan Trust Funds v. Harris, No. 85-C-9555 (N.D. Ill. June 18, 1986) (Available on Westlaw, DCT Library)

Covington v. Int'l Rehabilitation Associates, Inc., No. 86-3503 (E.D. Pa. Oct. 16, 1986) (Available on Westlaw, DCT Library)

Dameron v. Sinai Hosp. of Baltimore, Inc., 626 F. Supp. 1012 (D. Md. 1986)

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2
No. 86-1659

Supreme Court, U.S.
FILED

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

CONTINENTAL CAN COMPANY,
Petitioner,
v.

ROBERT GAVALIK, *et al.*, and
ALBERT JAKUB, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit

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CONTINENTAL CAN COMPANY,
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v.

ROBERT GAVALIK, *et al.*, and
ALBERT JAKUB, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the
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for the Third Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

Respondents submit this brief to demonstrate that the petition for writ of certiorari should be denied.

OPINIONS BELOW

The appendix to the petition does not include the district court's opinions resolving the exhaustion and statute of limitations issues. We have, accordingly, reprinted those opinions at pp. 12a-19a of the appendix to *this* brief. Additionally, as the court of appeals disposed of the exhaustion issue by declaring that its prior decision in *Zipf*

v. American Telephone and Telegraph Co., 799 F.2d 889 (3rd Cir. 1986), "clearly controls the resolution of Continental's exhaustion claim" (Pet. App. 30a), we have reprinted the *Zipf* opinion at pp. 1a-11a of the appendix to this brief. We cite to the appendix hereto as "Br. Opp. App. —."

COUNTER-STATEMENT OF THE CASE

Congress enacted ERISA in 1974. While most of ERISA's provisions are addressed to protecting the interests of employees who have already become entitled to benefits under an employee benefit plan, Congress also included the quite distinct prohibition that appears in Section 510, 29 U.S.C. § 1140, *viz.*, that "it shall be unlawful for any person to discharge . . . or discriminate against a participant . . . for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan"

In 1976, Continental adopted a company-wide program to accomplish precisely what Section 510 forbids. Captioned in Continental's internal documents a "liability avoidance" program (Pet. App. 11a & n.12, 13a, 80a), the program's purpose was to prevent those employees who had not already qualified for certain pensions ("shutdown pensions") from ever qualifying for those pensions (*id.* 39a-43a, 46a-47a).¹ The essential elements of the program were these:

¹ Continental's pension agreement provided that if a plant were permanently closed, affected employees would become entitled to immediate pensions if they met certain age and service combinations, even though they were too young to qualify for regular pensions. Continental anticipated that it would have to close a number of plants in ensuing years, and its "liability avoidance" program was designed to remove employees from the workforce before they had accumulated the age and service necessary to vest entitlement to those "shutdown pensions". (Pet. App. 8a-12a).

1. Through an elaborate computer study, Continental identified, at the plants with greatest potential pension liability, those employees whose combined age and service did not yet qualify them for shutdown pensions (*id.* 12a, 40a-41a).

2. A "cap" was placed on the size of the workforce at such plants, limiting the workforce almost exclusively to employees who *already* had qualified for shutdown pensions (*id.* 12a, 14a-15a).

3. All employees outside the cap were laid off from work, and were designated in the company's records (albeit they were not told this) "permanently laid off." An employee so designated was not to be recalled to work under any circumstances without the approval of top management at corporate headquarters (*id.* 12a-13a, 41a).

4. A "red flag" system was instituted to assure that employees designated "permanently laid off" would not inadvertently be recalled to work and thus allowed to qualify for shutdown pensions (*id.* at 13a, 41a).

5. Whereas prior to institution of this program plant managers had been instructed to adjust employment levels to whatever was necessary to accomplish the business available to the plant, plant managers were now instructed to adjust the volume of business at the plant to accommodate the cap on employment levels dictated by the "liability avoidance" program. Additional work, if it could not be accomplished by having already-qualified employees work overtime, was to be referred to other plants of the Company or contracted out. (*Id.* 13a, 41a, 78a-79a).

The instant lawsuit involves the Company's plant in Pittsburgh, Pennsylvania. That plant had one of the oldest workforces, and Continental envisioned that the plant might be closed sometime in the future. The Pittsburgh plant thus was one where the Company faced a large potential pension liability if employees not *yet* eligible for shutdown pensions continued working. Accord-

ingly, Pittsburgh was selected as one of three plants at which the liability avoidance program would be implemented first. A "cap" on employment was set for the plant; all outside the "cap," if not already on layoff, were laid off from work and were secretly designated "permanently laid off" to assure that they would not be recalled. (*Id.* 14a, 41a-43a.) Many employees were laid off just days or weeks short of the date that would have enabled them to qualify for shutdown pensions (*id.* 15a, n.17).

The Company had by design kept the existence of its liability avoidance program confidential, and secret from the employees and their union. (*Id.* 13a, 16a.) However, as the pattern of layoffs evolved over time, Pittsburgh employees suspected a pension-avoidance motive and instituted two lawsuits under § 510 that were consolidated for trial. In the course of discovery in these suits, plaintiffs unearthed extensive internal company documentation establishing the existence of the liability avoidance plan and its implementation at Pittsburgh. (*Id.* 16a.) A plaintiff class was certified, consisting of all who had been "permanently laid off" pursuant to the liability avoidance program. (*Id.* 67a-68a.) The lower courts' rulings pertinent to the petition for certiorari were as follows:

(1) *The Exhaustion Issue*

When suit was first filed, Continental moved to dismiss "for plaintiffs' failure to exhaust the grievance procedure set forth in Section 7 of the Pension Agreement" (Br. Op. App. 13a). The district court denied the motion on three separate grounds: (1) the court found that the plaintiffs' complaint was not cognizable as a grievance under the Pension Agreement, and accordingly there was no pension procedure plaintiffs *could* exhaust (*id.*); (2) in any event, as a matter of law § 510 "has conferred on plaintiffs a statutory right independent of the collective bargaining agreement, which may be enforced in court independent of the grievance procedure" (*id.*

13a-14a); and (3) "[t]he questions presented by the plaintiffs' suit, involving as they do subtle questions of intent and state of mind, are better decided in court after a full discovery process and with the procedural safeguards provided by normal court procedures" (*id.* 14a-15a).

The court of appeals expressly affirmed the district court's finding that plaintiffs could not have processed their claims as grievances under the Pension Agreement (Pet. App. 29a). The court also affirmed the district court's conclusion that as a matter of law employees are not required to exhaust contractual remedies before instituting suit under § 510 (*id.* 30a-33a), declaring that conclusion controlled by its prior holding in *Zipf v. American Telephone and Telegraph Co.*, 799 F.2d 889 (3rd Cir. 1986) (Pet. App. 30a).

(2) *The Statute of Limitations*

Continental also moved to dismiss on the ground that the lawsuits were barred by the applicable statute of limitations. The district court denied this motion as well. Because ERISA does not specify a limitations period for § 510 actions, the court declared that "the appropriate period is determined by reference to the state statute of limitations governing cases most analogous to the cause of action asserted by the plaintiffs" (Br. Opp. App. 18a). The court determined that the most analogous Pennsylvania statute was the six-year statute that applies, *inter alia*, to "an action charging employment discrimination" (*id.* 19a), and accordingly that the suit was timely filed (*id.*).

The court of appeals affirmed that the most analogous Pennsylvania statute of limitations is the six-year statute applicable to claims of employment discrimination, and that that is the time limit applicable to this case (Pet. App. 20a-23a). The court rejected Continental's arguments that the applicable time limit should be borrowed

from § 10(b) of the National Labor Relations Act (*id.* 23a-30a), or from that applicable to suits under the Civil Rights Act of 1871, 42 U.S.C. § 1983 (*id.* 18a-20a & n.20).

(3) *The Merits*

Following a lengthy trial, the district court found that Continental in fact had adopted the liability avoidance program and implemented it at the Pittsburgh plant, and that Continental had been motivated, in laying off each member of the class, by a desire to prevent those employees from qualifying for shutdown pensions (Pet. App. 77a-80a, 86a, 90a). Nevertheless, the district court entered judgment for defendant, finding that Continental had also been motivated by declining business and that *plaintiffs* had failed to prove that they would not have been laid off even in the absence of the pension-avoidance motive (*id.* 49a, 61a-64a, 86a, 90a).

The court of appeals reversed, and remanded for further proceedings. The court found two fundamental errors in the district court's disposition of the merits.

First, the court of appeals reasoned that the district court's findings established that Continental had engaged in a classwide violation of § 510. The district court had found that Continental developed a program to make employment decisions based upon a statutorily forbidden criterion, and that Continental had implemented that program by taking the impermissible criterion into account "in making each of the challenged decisions that resulted in the layoffs of individual class members" (*id.* 43a). Citing and following *Teamsters v. United States*, 431 U.S. 324 (1977), the court of appeals held that Continental's program of discriminatory decision-making was a classwide violation that entitled the class to an injunction against the program's continued operation (Pet. App. 47a-48a).

Second, as to the employees' entitlement to individual relief, the court of appeals ruled that the district court

had erred by placing the burden on plaintiffs to prove that but for Continental's illegal motivation the plaintiffs would not have been laid off. The court of appeals here applied the two-stage methodology for employment discrimination class actions prescribed by this Court in *Franks v. Bowman Transp. Co.*, 424 U.S. 747 (1976) and in *Teamsters*. The existence of a classwide violation created a presumption that all to whom the illegal program was applied were victims entitled to individual relief (Pet. App. 58a-60a). The district court had already found that Continental had applied the illegal program to each of the class members in deciding to lay them off. Continental still could escape liability to an individual employee by showing that that employee would have been laid off at the same time even in the absence of the illegal motivation. But, the court of appeals ruled, the burden of proof on that "but for" issue was Continental's, and the district court had erred by placing it on plaintiffs. (*Id.* 61a-64a.) The court accordingly remanded the case for further proceedings in which Continental is to "be afforded the opportunity to present evidence that as to any particular individual class member's request for relief, that individual is not so entitled because in the absence of Continental's illegal plan that individual would have been without work at the same time in any event" (*id.* 65a). "Continental's burden on this issue will be one of persuasion" (*id.* 66a).

ARGUMENT

There is a conflict among the circuits as to whether employees are required to exhaust pension plan remedies before instituting suit under § 510 of ERISA. But that conflict is immaterial to the disposition of *this* case, because both lower courts held that in this case there were no pension plan remedies that plaintiffs *could* exhaust. Moreover, the circuit conflict may be temporal, and resolve itself without the need for this Court's intervention. In any event, as the non-exhaustion rule of the court below is consistent with six decisions of this Court holding exhaustion not required for claims that employees' statutory rights have been infringed, certiorari should more appropriately be reserved for a decision—if any recurs—that runs against the weight of this Court's decisions.

As to the other questions presented in the petition, there is not a single district or appellate court that has embraced the theories petitioner espouses, and the questions plainly do not merit this Court's attention.

I. THE EXHAUSTION ISSUE

The petition treats all ERISA suits as if they were an undifferentiated mass. It is important at the outset to focus the issue that is presented by petitioner's first question.

ERISA is a statute creating many discrete causes of action. Most ERISA suits to date have involved § 502 (a) (i) (B), 29 U.S.C. § 1132(a) (1) (B), which creates a cause of action by a participant in a benefit plan "to recover benefits due to him under the terms of his plan" Because that is a contractual cause of action whose resolution turns entirely on the construction of the plan, and because Congress mandated that every plan have a review procedure that "afford[s] a reasonable opportunity to any participant whose claim for benefits has

been denied for a full and fair review by the appropriate named [plan] fiduciary" (§ 503(2), 29 U.S.C. § 1133 (2)), the courts of appeals *uniformly* have held that plaintiffs must exhaust available review procedures under the plan before instituting such an action.²

The instant suit is not of this type. The plaintiffs do not contend that they are entitled to benefits under the plan, nor do they bring a cause of action whose resolution turns upon the meaning of the plan. Rather, they sue under § 510 of ERISA, alleging that their employer removed them from their jobs to prevent them from accumulating the service that might someday have enabled them to qualify for benefits under the plan.

The plan does not forbid the conduct alleged by plaintiffs here. Nor, perforce, does the plan provide any remedy for such conduct. Rather, § 510 itself creates the substantive prohibition which plaintiffs allege the employer has violated. Section 510 is similar in function to Title VII of the Civil Rights Act of 1964 and other statutes that forbid employment discrimination on specified grounds.

This Court, in six decisions, the most recent this Term, has held that employees need not exhaust contractual remedies before instituting suit alleging the violation of rights created by various statutes designed to provide minimum substantive guarantees to individual workers. As stated this Term in *Atchison, Topeka and Santa Fe Ry. Co. v. Buell*, — U.S. —, 107 S.Ct. 1410 (1987):

This Court has, on numerous occasions, declined to hold that individual employees are, because of the availability of arbitration, barred from bringing claims under federal statutes. See, *e.g.*, *McDonald v. West Branch*, 466 U.S. 284 (1984); *Barrentine v.*

² That is the rule of the court below (Pet. App. 31a), and also of the Ninth Circuit which, like the court below, has held that claims of *statutory* violations, as distinguished from claims arising under the plan, need not be exhausted. *Amaro v. Continental Can Co.*, 724 F.2d 747, 751 (9th Cir. 1984).

Arkansas-Best Motor Freight System Inc., 450 U.S. 728 (1981); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974). Although the analysis of the question under each statute is quite distinct, the theory running through these cases is that notwithstanding the strong policies encouraging arbitration, "different considerations apply where the employee's claim is based on rights arising out of a statute designed to provide minimum substantive guarantees to individual workers." *Barrentine, supra*, at 737. [*Id.* at 1415.]³

The Third and Ninth Circuits, citing and following this line of Supreme Court decisions, have held that employees need not exhaust pension plan remedies before instituting suit alleging the violation of § 510 rights. *Amaro v. Continental Can Co.*, 724 F.2d 747 (9th Cir. 1984); *Zipf v. American Tel. & Tel. Co.*, 799 F.2d 883 (3rd Cir. 1986). Because the Court below in the instant case declared its *Zipf* decision controlling, we have reprinted *Zipf* in the appendix to this brief (Br. Op. App. 1a-11a).

A circuit conflict exists, however, because, without citing these Supreme Court decisions or explaining why they are not applicable to § 510, the Seventh Circuit has held that district courts have discretion to require exhaustion of pension plan remedies, *Kross v. Western Electric Co., Inc.*, 701 F.2d 1238, 1243-45 (7th Cir. 1983); *Dale v. Chicago Tribune Co.*, 797 F.2d 458, 465-67 (7th Cir. 1986), *cert. denied*, 107 S.Ct. 954 (1987), and the Eleventh Circuit has held that available pension plan remedies *must* be exhausted before instituting a § 510 action, *Mason v. Continental Group, Inc.*, 763 F.2d 1219, 1224-27 (11th Cir. 1985), *cert. denied*, 106 S.Ct. 863 (1986).⁴

³ In addition to the decisions cited in this passage, see *McKinney v. Missouri-Kansas-Texas R.R. Co.*, 357 U.S. 265, 268-70 (1958); *U.S. Bulk Carriers, Inc. v. Arguelles*, 400 U.S. 351, 354 (1971).

⁴ The petition cites two other decisions as part of the conflict. *Alfarone v. Bernie Wolff Construction*, 788 F.2d 76 (2d Cir.), *cert.*

1. The circuit conflict is not material to the disposition of this case. The Seventh Circuit's rule would not have produced a different outcome in this case, because the district court here clearly manifested its view that exhaustion was not advisable in this case (Br. Opp. App. 14a-15a). And neither the Seventh nor the Eleventh Circuit's exhaustion requirements would be applicable to this case because there *were* no pension plan remedies that plaintiffs could invoke.

The district court in this case gave alternative, independent reasons for denying Continental's motion to dismiss for failure to exhaust. While holding that as a matter of law exhaustion is not required in § 510 cases (Br. Opp. App. 13a-14a), the district court also determined that there was no procedure under the Pension Agreement that plaintiffs *could* exhaust:

Defendant has filed a motion to dismiss for plaintiffs' failure to exhaust the grievance procedure set forth in Section 7 of the Pension Agreement between the defendant and the United Steelworkers of America, the collective bargaining agent of plaintiffs. Section 7 provides:

If, during the term of this Agreement, any differences shall arise between the Company and any employee who shall be an applicant for a lump sum retirement allowance, pension or deferred benefit as provided in this Agreement, as to whether or not such employee is entitled to or as to the amount of such lump sum retirement allowance, pension or deferred benefit, such differences . . . may be taken up as a grievance

[W]e do not believe that the plaintiffs' claim falls within the terms of the above-quoted provision since

denied, 107 S. Ct. 316 (1986); *Air Line Pilots Association v. Northwest Airlines, Inc.*, 627 F.2d 272 (D.C. Cir. 1980). Those decisions, however, did not involve claims under § 510, and thus did not address the issue presented here.

they are, at this time at least, neither applicant for a pension nor in dispute with the defendant as to whether or not they are entitled to a pension. The plaintiffs' claim is not that they have been denied their pensions, but that they have been denied the opportunity to eventually become entitled to a pension. [*Id.* 13a.]⁵

Petitioner asserts that "the circuit court did not discuss the issue in its opinion" (Pet. 9 n.5). That is not correct. The court below expressly affirmed the district court's determination on this point (Pet. App. 29a):

In ruling on Continental's motion to dismiss for failure to exhaust grievance procedures, the district court had occasion to consider the nature of appellants' claim and whether that claim was covered under the Pension Agreement. The court stated: "[W]e do not believe that the plaintiffs' claim falls within the terms of the [Pension Agreement] . . . since they are . . . neither applicants for a pension nor in dispute with the defendant as to whether or not they are entitled to a pension. The plaintiffs' claim is not that they have been denied their pensions, but that they have been denied the opportunity to eventually become entitled to a pension." Jt. App. at 165. We agree with the district court's characterization of appellants' claims and its conclusion that such claims are not encompassed under the terms of the Pension Agreement.

Petitioner asserts that the district court's conclusion that plaintiffs' claim was not cognizable as a grievance under the Pension Agreement is "plainly erroneous" (Pet. 9 n.5). While that is not in any event an issue worthy of this Court's attention, the lower courts' reading of the Pension Agreement is plainly correct. Not only is the dispute mechanism limited in the respects those courts described, but the Agreement also states:

⁵ The provision quoted by the district court appears at Pet. App. 126a.

[T]he arbitrator . . . shall have authority only to interpret and apply the provisions of this Agreement [Pet. App. 126a.]

As is evident, there was no pension procedure under which plaintiffs could assert their § 510 claim, and both courts below have so held. The circuit conflict on whether exhaustion is required thus is irrelevant to the disposition of this case, for no court requires the exhaustion of remedies that do not exist. The situation is not unlike that in *Iowa Beef Packers, Inc. v. Thompson*, 405 U.S. 228 (1972), where the Court granted certiorari to decide whether arbitral exhaustion of Fair Labor Standards Act claims was required, only to have to dismiss the writ as improvidently granted upon discovering that the dispute was not in any event arbitrable under the parties' agreement.⁶

Petitioner has sought to muddy the waters by suggesting that plaintiffs could have asserted their § 510 claim in the grievance procedure of the basic labor agreement (a separate agreement from the pension agreement) (Pet. 9 n.5). Neither court below discussed the question whether such a challenge could be maintained under the basic labor agreement's grievance procedure. That agreement defines a "grievance" as "any difference between the Local Management and the Union or employees as to the interpretation or application of or compliance with this Agreement respecting wages, hours, or conditions of employment" (Pet. App. 105a; emphasis added), and states that the arbitrator "shall not have jurisdiction to alter or amend in any way the provisions of this Agreement and his decision must be in accordance with the terms of this Agreement" (*id.* 112a). As in *Iowa Beef*

⁶ The issue not reached in *Iowa Beef Packers* was later decided in *Barrentine v. Arkansas-Best Motor Freight System Inc.*, 450 U.S. 728 (1981) (exhaustion of FLSA claims not required).

Packers, supra, the agreement does not authorize arbitration of statutory claims.

Moreover, even were the § 510 claim arbitrable under the basic labor agreement, that would be irrelevant to the circuit conflict that petitioner invokes. For the Seventh and Eleventh Circuits have mandated exhaustion only of review procedures under the pension agreement, and the rationale of their opinions would not stretch to mandating exhaustion under a separate labor agreement.

The Eleventh Circuit's holding in *Mason* was that "plaintiffs must exhaust their remedies *under the pension plan agreement* before they may bring their ERISA claims in federal court," 763 F.2d at 1227 (emphasis added). That requirement, the Eleventh Circuit reasoned, would "enhance the plan's trustees' ability to carry out their fiduciary duties expertly and efficiently," "allow prior fully considered actions by pension plan trustees," and "be consistent with the intent of Congress that pension plans provide intrafund review procedures," *ibid*. None of those rationales would support requiring exhaustion of procedures that are not provided in the pension plan agreement but that exist under a separate labor agreement.

Similarly, the Seventh Circuit in *Kross* cited the same considerations, determining that "Congress intended fund trustees to have primary responsibility for claim processing" and that "[t]o make every claim dispute into a federal case would undermine the claim procedure contemplated by the Act," 701 F.2d at 1244 (quoting *Challenger v. Local Union No. 1 of Intern. Bridge*, 619 F.2d 645, 649 (7th Cir. 1980)).

No court has suggested that exhaustion is required of non-plan remedies, and the sole rationale the Seventh and Eleventh Circuits have proffered for exhaustion—a perceived congressional interest in allowing plan administrators to resolve disputes—is inapplicable to non-plan pro-

cedures. In the absence of that rationale, there would be nothing that even arguably distinguishes § 510 of ERISA from the other substantive statutes under which this Court consistently has held exhaustion is not required.

2. The circuit conflict would not warrant this Court's plenary review even if it were not irrelevant to the outcome of this case. This is so for two reasons:

First, the circuit conflict may well resolve itself without the need for intervention by this Court. The Seventh and Eleventh Circuit decisions do not mention, let alone give consideration to, this Court's unbroken line of decisions holding that exhaustion is not required under other statutes conferring minimum substantive employment protections on individual workers. See pp. 9-10, *supra*. Subsequent to the decisions of those circuits, this Court has issued its decision in *Buell*, synthesizing from its prior decisions "the theory . . . that notwithstanding the strong policies encouraging arbitration, 'different considerations apply where the employee's claim is based on rights arising out of a statute designed to provide minimum substantive guarantees to individual workers,'" 107 S.Ct. at 1415, quoting *Barrentine*, 450 U.S. at 737, and the Third Circuit has issued its decision in *Zipf* meticulously demonstrating that the Seventh and Eleventh Circuit decisions are inconsistent with this Court's rulings (Br. Opp. App. 4a-9a). District courts within and without those circuits have recognized the inconsistency between those circuits' rulings and this Court's decisions. See, e.g., *Allen v. American Home Foods, Inc.*, 644 F. Supp. 1553, 1563 n.10 (N.D. Ind. 1986) ("[s]everal recent cases draw the continuing viability of *Kross* into doubt"); *Manser v. Missouri Farmers Ass'n, Inc.*, 652 F. Supp. 267, 272 (W.D. Mo. 1986) (*Kross* was based on a "flawed premise," as persuasively demonstrated in *Zipf*). In time, the Seventh and Eleventh Circuits may reverse these decisions which, as we show *infra* at pp. 16-18, are demonstrably incorrect.

The issue is not one that arises with such frequency that waiting would be inappropriate. In the 13 years since ERISA was enacted, the issue has been addressed by only four circuits. (Petitioner's effort to cloak the issue with apparent widespread importance is predicated upon lumping all "ERISA exhaustion" cases together—not separating § 510 claims from claims arising under the pension plan or under other provisions of ERISA; thus, most of the cases cited at Pet. App. 131a-134a are not § 510 cases.)

Second, even if the issue as to which a circuit conflict exists were presented in this case, and even if the Court were disposed not to wait to see if the conflict dissolves, we suggest that this would not be the case in which to address the conflict. The decision below (and *Zipf*, which controlled the decision below) are in full harmony with six decisions of this Court dealing with exhaustion under other substantive employment statutes. The decisions of the two circuits that have strayed from that course are the ones in need of correction. Certiorari ought to await a case in which a court of appeals has departed from the principles clearly established in this Court's opinions.

The decision below is plainly correct. On its face § 510 prescribes a lawsuit as the mechanism for enforcement. Any contention that this statute is distinguishable from all the others in which this Court has held exhaustion not required necessarily would have to be premised on evidence that Congress intended a different result here. But no such evidence exists.

Because the Seventh and Eleventh Circuits did not take account of this Court's pertinent decisions, they did not proffer an explanation as to why § 510 is distinguishable from the statutes as to which this Court has held exhaustion not required. They did, however, state that Congress' inclusion of § 503 in ERISA, 29 U.S.C. § 1133, requiring a dispute mechanism in the plan, signified a

preference for dispute resolution in the first instance by plan administrators. Section 503 provides:

§ 1133. Claims procedure

In accordance with regulations of the Secretary, every employee benefit plan shall—

(1) provide adequate notice in writing to any participant or beneficiary *whose claim for benefits under the plan has been denied*, setting forth the specific reasons for such denial, written in a manner calculated to be understood by the participant, and

(2) afford a reasonable opportunity to any participant *whose claim for benefits has been denied* for a full and fair review by the appropriate named fiduciary of the decision denying the claim. [Pet. App. 100a, emphasis added.]

As the Third Circuit pointed out in *Zipf*:

The provision relating to internal claims and appeals procedures, Section 503, refers only to procedures for claims for *benefits*. There is no suggestion that Congress meant for these internal remedial procedures to embrace Section 510 claims based on violations of ERISA's substantive guarantees. [Br. Opp. App. 5a-6a, emphasis in opinion.]

The enactment of § 503 thus is no indicator that Congress intended to depart from the norm and require exhaustion of § 510 claims. Petitioner does not contend otherwise in the petition.

Petitioner *does* contend, however, that the legislative debates indicate an intention that there be exhaustion of § 510 claims (Pet. 12-14). But, at the Third Circuit demonstrated in *Zipf*, those debates suggest precisely the opposite (Br. Opp. App. 6a).

Senator Hartke inquired of Senator Javits, one of the bill's principal sponsors:

MR. HARTKE. . . . Let me ask what administrative procedures are available to the employee. *Does he not have to go to court?*

MR. JAVITS. *Yes*; but heretofore he had no remedy at all. I know the Senator was one of the most forceful advocates of this right to go to court on the basis of race or sex discrimination. *This gives the employee the same right.* [2 Legislative History of the Employee Retirement Income Security Act of 1974, 1641-42 (1976) (emphasis added); hereinafter "Leg. Hist.".] ⁷

Beyond this exchange, the only reference in the legislative history to administrative or arbitral remedies for § 510 claims was contained in an amendment proposed by Senator Hartke. Senator Hartke fully understood that the bill as drafted required court actions for enforcement of § 510. 2 Leg. Hist. 1775, 1837. His proposed amendment would have substituted an administrative remedy for court actions, the administrative remedy consisting of arbitration where an arbitration clause encompassed the dispute. 2 Leg. Hist. 1774-75, 1835-36. The amendment was rejected by voice vote, 2 Leg. Hist. 1838, and the Conference Report stated that § 510 rights were to be enforced by "a civil action." H. Conf. Rep. No. 93-1280, 93d Cong., 2d Sess. 330 (1974), reprinted at 3 Leg. Hist. 4597.

The Third Circuit was surely right in concluding, in *Zipf*, that this legislative history does not warrant a departure from the norm established by this Court's prior decisions, *i.e.*, that exhaustion is not required of claims that substantive rights conferred on individual workers by statute have been violated. (Br. Opp. App. 5a-6a). Indeed, were the Court disposed to reach the

⁷ The "right" given a victim of race or sex discrimination is, of course, a right to sue without exhausting administrative remedies. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974).

issue in this case, we submit that summary affirmance would be in order.

II. THE OTHER ISSUES

The remaining issues are plainly unworthy of this Court's time and attention. Accordingly, even if the Court were disposed to grant certiorari on the first issue, it should limit the grant to that one issue lest the parties and the Court be subjected to litigation of issues that do not deserve this Court's plenary attention.

A. The Statute of Limitations

The petition proffers novel approaches for determining the statute of limitations in § 510 actions that have not been embraced by a single district or appellate court and that have nothing to commend them.

First, invoking this Court's decision in *Del Costello v. Teamsters*, 462 U.S. 151 (1983), petitioner contends that the six-month time limit of § 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b), should control actions brought under § 510 of ERISA. *Del Costello*, of course, was not an ERISA case. And the Court was careful in *Del Costello* to emphasize the limit of its holding:

We stress that our holding today should not be taken as a departure from prior practice in borrowing limitations periods for federal causes of action, *in labor law or elsewhere*. We do not mean to suggest that federal courts should eschew use of state limitations periods anytime state law fails to provide a perfect analogy On the contrary, as the courts have often discovered, there is not always an obvious state-law choice for application to a given federal cause of action; yet *resort to state law remains the norm for borrowing of limitations periods*. [*Id.* at 171; emphasis added.]

The court below, in conformity with every decision to date, looked to state law to borrow the limitations period for actions under § 510 of ERISA.

Second, equally far afield is petitioner's alternative contention that the time limit for § 510 actions should be the same as the selected for actions under 42 U.S.C. § 1983 in light of *Wilson v. Garcia*, 471 U.S. 261 (1985). Again, no court has so held, and as the court below cogently demonstrated (Pet. App. 18a-21a), the argument makes no sense.

Third, petitioner contends that the court below erred in determining which Pennsylvania limitations statute is applicable to claims of employment discrimination. But this Court surely has no interest in examining a question of state law as to which the district court and court of appeals—all Pennsylvanians—were in unanimity. See, e.g., *Bishop v. Wood*, 426 U.S. 341, 347 (1976); *Pembaur v. City of Cincinnati*, — U.S. —, 106 S.Ct. 1292, 1301 & n.13 (1986), and cases cited therein.⁸

B. The "But For" Issue

The court of appeals' disposition of the merits is in exact conformity with this Court's decisions in *Franks* and *Teamsters*, and presents no issue warranting this Court's attention. This Court held in *Teamsters* that plaintiffs in a class action establish a classwide violation by proving that the employer has pursued "a policy of discriminatory decisionmaking," 431 U.S. at 362, i.e., by proving that "a [discriminatory] policy existed," *id.* at 360. See also, *Franks*, 424 U.S. at 772. The district court had found precisely that here. And that proof "[w]ithout any further evidence . . . justifies an award of prospective relief" which "might take the form of an injunctive order against

⁸ Respondents have contended throughout that, whatever time limit might be applicable, Continental's deliberate concealment of the existence of its liability avoidance program (including concealment of the fact that employees had been designated "permanently laid off") meant either that the cause of action did not accrue or that the time limit was tolled. The lower courts had no need or occasion to address that contention.

continuation of the discriminatory practice.” *Teamsters*, 431 U.S. at 361.

The court below recognized that proof of the classwide violation did not automatically entitle the laid off employees to make-whole relief. Rather, the court adhered faithfully to *Franks* and *Teamsters*, which held that proof of the classwide violation “supports an inference that any particular employment decision, during the period in which the discriminatory policy was in force, was made in pursuit of that policy,” *Teamsters*, 431 U.S. at 362, and that the burden of persuasion accordingly shifts to the defendant “to prove that individuals . . . were not in fact victims” of the discriminatory policy, *Franks*, 424 U.S. at 772. See also, *id.* at 773 n.32; *Teamsters*, 431 U.S. at 362. As Continental contended that the individuals would have suffered layoff at the same times even had it not taken pension-avoidance into account in making its employment decisions, the case was remanded to afford Continental the opportunity to prove that claim. The district court was reversed because, in contravention of *Franks* and *Teamsters*, it had placed the burden on *plaintiffs* to prove that they would *not* have been laid off in the absence of the discriminatory policy.

CONCLUSION

For the reasons stated above, the petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

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APPENDIX

UNITED STATES COURT OF APPEALS
THIRD CIRCUIT

No. 85-3420

MONICA M. ZIPF,

Appellant,

v.

AMERICAN TELEPHONE AND TELEGRAPH CO.

Argued June 2, 1986

Decided Aug. 27, 1986

Before GIBBONS, BECKER, and STAPLETON, Circuit Judges.

OPINION OF THE COURT

STAPLETON, Circuit Judge.

In this appeal we are called upon to decide whether a participant in a federally regulated employee benefits plan must exhaust internal administrative remedies before filing suit in federal court for alleged interference with her statutory rights. We find that no exhaustion is required, and so reverse the judgment of the district court.

I

Monica M. Zipf, appellant, was employed by the American Telephone & Telegraph Company, appellee ("AT & T"), from March 21, 1969 until April 5, 1984. In 1981, Zipf was diagnosed as suffering from rheumatoid ar-

thrititis. This illness, and its episodic "flare-ups," occasionally caused Zipf's absence from work. Her medical condition led to her taking a disability leave of absence from her employment, beginning on September 27, 1982. She remained on disability leave, which included a period of maternity leave, until, with the permission of her physician, she returned to work in July 1983. Zipf received disability benefits under the terms of AT & T's Sickness and Accident Disability Benefit Plan ("the plan") for at least part of this period.

After Zipf's return to full-time status, she continued occasionally to miss work on account of her illness. On Friday, March 30, 1984, Zipf's rheumatoid arthritis became aggravated and she began a period of absence that continued until the final day of her employment, Wednesday, April 5, 1984. On that day, Zipf's supervisor visited her at home and informed her that a decision had been made to terminate her because of her "excessive absenteeism."

Zipf alleges that under the terms of AT & T's plan, she would have been entitled to disability benefits beginning on the eighth calendar day of absence from work. As an employee with more than fifteen years of service with AT & T, she was potentially eligible for substantial benefits, in an amount equal to her full rate of pay for up to 26 weeks and at half pay for the following 26 weeks. Moreover, if her disability had thereafter continued to prevent her return to work, she then might have been able to obtain benefits under AT & T's Long Term Disability Plan.

Zipf's eighth day of absence from work as a result of illness would have been April 6, 1984. Zipf asserts that she was terminated on the seventh calendar day of absence, April 5, 1984, to prevent her from potentially qualifying for the substantial benefits for which she would have become eligible on April 6 and to eliminate a "disability problem." Zipf filed a complaint against

AT & T in the district court, alleging that she had been fired in violation of state law and Section 510 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1140, the provision of that Act which protects employees from interference with their statutory and plan rights. Zipf sought reinstatement, backpay, and other equitable restitution.

Following discovery, AT & T moved for summary judgment. It argued that Zipf failed to exhaust the internal administrative remedies made available by the plan and that she should not be permitted to bring this suit until she has done so. Second, AT & T asserted that, because there are no genuine issues of material fact, it was entitled to summary judgment as a matter of law.

The district court granted summary judgment to AT & T on its exhaustion theory, without reaching the company's alternative ground, and dismissed the Section 510 claim without prejudice. The court also dismissed Zipf's pendent state law claim as preempted by ERISA. Zipf has appealed the district court's ruling that the failure to exhaust administrative remedies barred her Section 510 suit. She has not appealed the dismissal of her pendent state claim for wrongful discharge.

The parties agree that Zipf was a participant in the Sickness and Accident Disability Benefit Plan, a plan subject to ERISA. As mandated by ERISA Section 503, 29 U.S.C. § 1133, the plan includes claims and appeals procedures which give participants certain rights regarding the determination of eligibility for disability benefits.¹ AT & T admits that this plan provides disability

¹ The plan summary states that employees have the "right under ERISA and the Disability Benefit Plan to file a written claim for payment of benefits under the Plan. . . . If a claim for benefits is denied in whole or in part, the claimant . . . may appeal this denial. . . ." The plan does not expressly require internal exhaustion nor does it assert that the appeal procedure is an employee's exclusive remedy. The plan summary states "No one, including your

benefits beginning on the eighth day of a disability only "so long as said employee remain[s] an employee for that eight (8) day period," a condition that Zipf did not satisfy. Zipf did not seek benefits under the plan before bringing this action.

II

Zipf's federal claim is based upon Section 510 of ERISA which provides:

[It is unlawful] for any person to discharge . . . or discriminate against a participant or beneficiary . . . for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this subchapter, or the Welfare and Pension Plans Disclosure Act. . . . 29 U.S.C. § 1140.

Congress enacted this section to prevent unscrupulous employers from discharging or harassing their employees in order to prevent them from obtaining their statutory or plan-based rights. *West v. Butler*, 621 F.2d 240, 244-26 (6th Cir.1980). This was done "in order to completely secure the rights and expectations brought into being by this landmark reform legislation." S.Rep. No. 127, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Admin. News 4838, 4872.

This case presents two distinct exhaustion issues. The first is whether Zipf, before seeking judicial relief on her Section 510 claim, was required to submit that claim to the plan. In similar situations, the Seventh and Eleventh Circuits have held that such a submission to the plan should normally be required. *Kross v. Western Electric*

employer, . . . may fire you or otherwise discriminate against you in any way to prevent you from obtaining a benefit or exercising your rights under ERISA. . . . If you are discriminated against for asserting your rights, you may seek assistance from the U.S. Department of Labor or you may file suit in Federal Court."

Co., 701 F.2d 1238 (7th Cir.1983) (affirming a district court decision requiring employee first to present his claim of discrimination to the plan); *Mason v. Continental Group, Inc.*, 763 F.2d 1219 (11th Cir.1985), *cert. denied* — U.S. —, 106 S.Ct. 863, 88 L.Ed.2d 902 (1986) (claims grounded in statutory provisions of ERISA should be required first to be brought through plan's appeals procedures). The Ninth Circuit has reached a contrary conclusion. *Amaro v. Continental Can Co.*, 724 F.2d 747 (9th Cir.1984) (claim arising from alleged breach of ERISA Section 510 not subject to exhaustion requirement). The second issue is whether Zipf, before seeking judicial relief on her Section 510 claim, must submit to the plan the question of whether she would have been eligible for benefits had she not been discharged.

The district court in this case resolved the first issue in favor of requiring exhaustion, relying primarily on our decision in *Wolf v. National Shopmen*, 728 F.2d 182, 185 (3d Cir.1984). We disagree with the district court's reading of that case. In *Wolf*, we held that a party bringing an action under ERISA section 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), to enforce or clarify the terms of a benefit plan, must exhaust administrative remedies. *Wolf* does not govern actions, such as Zipf's, which are premised on Section 502(a)(3), 29 U.S.C. § 1132(a)(3) and are brought not to enforce the terms of a plan, but to assert rights granted by the federal statute.

We decline AT & T's invitation to find in ERISA an implied exhaustion requirement applicable to substantive rights conferred by that Act. First, we find no indication in the Act or its legislative history that Congress intended to condition a plaintiff's ability to redress a statutory violation in federal court upon the exhaustion of internal remedies. The provision relating to internal claims and appeals procedures, Section 503, refers only

to procedures regarding claims for *benefits*.² There is no suggestion that Congress meant for these internal remedial procedures to embrace Section 510 claims based on violations of ERISA's substantive guarantees.

On the contrary, the legislative history suggests that the remedy for Section 510 discrimination was intended to be provided by the courts. 2 *Legislative History of the Employee Retirement Income Security Act of 1974*, 1641-42 (1976) (remarks of Sens. Hartke and Javits).³ Indeed, an amendment that would have created an administrative remedy for Section 510 claims, to be established by the Department of Labor, was defeated. *See id.*, at 1774-75, 1835-37.⁴

² 29 U.S.C. § 1133, Section 503, reads:

In accordance with regulations of the Secretary, every employee benefit plan shall—

(1) provide adequate notice in writing to any participant or beneficiary whose claim for benefits under the plan has been denied, setting forth the specific reasons for such denial, written in a manner calculated to be understood by the participant, and

(2) afford a reasonable opportunity to any participant whose claim for benefits has been denied for a full and fair review by the appropriate named fiduciary of the decision denying the claim.

³ Sen. Hartke. "Let me ask what administrative procedures are available to the employee [who raises a Section 510 claim]. Does he not have to go to court?"

Sen. Javits: "Yes; but heretofore he had no remedy at all. I know the Senator was one of the forceful advocates of this right to go to court on the basis of race or sex discrimination. This gives the employee the same right."

2 *Legislative History* at 1641-42.

⁴ The legislative history upon which *Mason*, 763 F.2d at 1227 and *Amato v. Bernard*, 618 F.2d 559, 566-68 (9th Cir. 1980), relied, while supporting the proposition that exhaustion should apply where a claimant seeks benefits, does not indicate a congressional intent that exhaustion of statutory claims be required.

Moreover, we believe this court has heretofore rejected the underlying premise of AT & T's argument in *Barrowclough v. Kidder, Peabody & Co., Inc.*, 752 F.2d 923 (3d Cir.1985). In *Barrowclough*, while recognizing the strong national policy favoring arbitration, we held that suits alleging violation of substantive rights conferred by ERISA can be brought in a federal court notwithstanding an agreement to arbitrate. We there observed:

With the enactment of ERISA, we must now accommodate its policy of providing federal court access and federal law remedies to pension claimants and their beneficiaries with the federal policy favoring enforcement of arbitral agreements embodied in the Federal Arbitration Act, 9 U.S.C. §§ 1-13 (1982).

We conclude the most reasonable accommodation is to hold that claims to establish or enforce rights to benefits under 29 U.S.C. § 1132(a) that are independent of claims based on violations of the substantive provisions of ERISA are subject to arbitration, (citations omitted) while claims of statutory violations can be brought in a federal court notwithstanding an agreement to arbitrate. (citations omitted) Under the distinction we make between statutory and contractual claims, ERISA neither completely supplants nor is completely subordinate to arbitration. . . .

752 F.2d at 939.

Thus, in *Barrowclough*, we "drew a distinction . . . between claims based on pension rights created by contract, which must be arbitrated [where the parties have so agreed], and claims based on purely statutory rights created by ERISA, which may be asserted in federal court directly." *DelGrosso v. Spang & Co.*, 769 F.2d 928,

932 (3d Cir.1985), *cert. denied* — U.S. —, 106 S.Ct. 2246, 90 L.Ed.2d 692 (1986). When a plan participant claims that he or she has unjustly been denied benefits, it is appropriate to require participants first to address their complaints to the fiduciaries to whom Congress, in Section 503, assigned the primary responsibility for evaluating claims for benefits. This ensures that the appeals procedures mandated by Congress will be employed, permits officials of benefit plans to meet the responsibilities properly entrusted to them, encourages the consistent treatment of claims for benefits, minimizes the costs and delays of claim settlement in a non-adversarial setting, and creates a record of the plan's rationales for denial of the claim. *See Wolf v. National Shopmen Pension Fund*, 728 F.2d 182, 185 (3d Cir. 1984); *Grossmuller v. International Union*, 715 F.2d 853, 856-57 (3d Cir.1983); *Amato v. Bernard*, 618 F.2d 559, 567 (9th Cir.1980); *see also Barrowclough*, 752 F.2d at 939.

However, when the claimant's position is that his or her federal rights guaranteed by ERISA have been violated, these considerations are simply inapposite. Unlike a claim for benefits brought pursuant to a benefits plan, a Section 510 claim asserts a statutory right which plan fiduciaries have no expertise in interpreting. Accordingly, one of the primary justifications for an exhaustion requirement in other contexts, deference to administrative expertise, is simply absent. Indeed, there is a strong interest in judicial resolution of these claims, for the purpose of providing a consistent source of law to help plan fiduciaries and participants predict the legality of proposed actions. Moreover, statutory interpretation is not only the obligation of the courts, it is a matter within their peculiar expertise. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 57, 94 S.Ct. 1011, 1024, 39 L.Ed.2d 147 (1974).

These considerations, together with Supreme Court precedent pertaining to analogous statutory schemes,⁵ supported the balance which we struck in *Barrowclough*. Each of these considerations and each of the cases relied upon in that case provide the same counsel here. Because we perceive no basis for striking a different balance in this context, we hold that an employee with a claim under Section 510 of ERISA need not submit that claim to the plan before seeking relief in a federal district court.

Nor are we persuaded by AT & T's alternative argument that Zipf at least should be required to submit to the plan the issue of whether she would have been eligible for benefits had she not been discharged. While plan fiduciaries, as we have noted, are particularly qualified to resolve issues of eligibility, we perceive no legitimate basis for requiring Zipf to petition them before pursuing her judicial remedy.

Zipf is making no claim for benefits and concedes that she is not entitled to disability payments. Under these circumstances there is simply no reason to believe that the plan fiduciaries will resolve the hypothetical issue of whether she would have been entitled to benefits had she not been discharged.

Moreover, contrary to AT & T's suggestion, a resolution of this hypothetical issue by the plan fiduciaries

⁵ See e.g., *McDonald v. City of West Branch*, 466 U.S. 284, 104 S.Ct. 1799, 80 L.Ed.2d 302 (1984) (failure to prevail in arbitration cannot foreclose lawsuit based on same facts brought under 42 U.S.C. § 1983); *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 101 S.Ct. 1437, 67 L.Ed.2d 641 (1981) (exhaustion of arbitration not a prerequisite to suit to enforce statutory rights under Fair Labor Standards Act); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 94 S.Ct. 1011, 39 L.Ed.2d 147 (1974) (claim of race discrimination under Title VII not foreclosed by plaintiff's failure to prevail on the same claim brought under binding arbitration).

would neither "focus the issues" in Zipf's Section 510 suit nor otherwise materially aid the district judge in that suit. Section 510 itself indicates that the employee need not show that "but for" the unlawful interference, the employee would have been entitled to benefits. The statutory language forbids conduct taken for "the purpose of interfering with the attainment of any right to which such participant *may* become entitled," regardless of whether the interference is successful and regardless of whether the participant would actually have received the benefits absent the interference. Thus, Section 510 does not require Zipf to demonstrate that she would have been entitled to benefits on April 6, or at any other specific time.

It is, of course, true that the employee in a Section 510 suit needs to establish that, at the time of the alleged violation, he or she had the potential of receiving benefits. Otherwise, there can be no credible claim that the employer's discharge or harassment decision was motivated by a desire to prevent the employee from receiving his or her due. Nevertheless, cases in which the existence of such a potential is contested will be rare, and we think it unlikely that, resolution of that issue, when contested, will present complex issues of plan interpretation, a matter reserved for the plan trustees in the first issue. See *Wolf v. National Shopmen Pension Fund*, 728 F.2d 182, 185 (3d Cir.1984). While we cannot rule out the possibility of a Section 510 suit which presents a substantial issue of plan interpretation, that possibility does not justify an across-the-board barrier to judicial relief.⁶

⁶ We acknowledge that cases may arise in which a Section 510 claim is so closely intertwined with a serious issue requiring interpretation of a benefit plan that a trial court could properly stay the statutory action pending resolution of the issue by the plan fiduciaries. See *Amaro*, 724 F.2d at 752-53 (suggesting that a trial court can stay a statutory claim that arises out of same facts presented

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For these reasons, we hold that Zipf is not required first to exhaust her benefit plan's internal procedures before bringing her claim that her employer fired her to prevent her from obtaining disability benefits.

III

* * *

[The Court here dealt with an unrelated issue]

IV

For the reasons stated above, this court will reverse the judgment of the district court and remand the case for proceedings consistent with this opinion.

in an ongoing administrative or arbitral proceeding). We are not confronted with such a case, however, and we express no opinion with respect to the approach suggested in *Amaro*.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 81-1519

ROBERT GAVALIK, *et al.*,
Plaintiffs,
vs.

CONTINENTAL CAN COMPANY,
Defendant.

MEMORANDUM OPINION

BLOCH, District J.

This action charges that the defendant manipulated plaintiffs' length of employment in order to deprive them of certain pension benefits. Continental Can awards a pension to employees who have attained 20 years of continuous service and whose age and years of service total at least 65 and less than 75. Specifically, the complaint alleges that the defendant closed a division of its West Mifflin plant so as to lay the plaintiffs off prior to their 20 years of service. Furthermore, the complaint alleges that the defendant continued thereafter to meet its production needs by working its employees overtime, rather than calling plaintiffs back.

This action is brought pursuant to § 510 of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1140, which provides, "It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary . . . for the purpose of interfering with the attainment of any right to which such participant may become entitled under [an employee benefits plan]."

Defendant has filed a motion to dismiss for plaintiffs' failure to exhaust the grievance procedure set forth in Section 7 of the Pension Agreement between the defendant and the United Steelworkers of America, the collective bargaining agent of plaintiffs. Section 7 provides:

"If, during the terms of this Agreement, any differences shall arise between the Company and any employee who shall be an applicant for a lump sum retirement allowance, pension or deferred benefit as provided in this Agreement, as to whether or not such employee is entitled to or as to the amount of such lump sum retirement allowance, pension or deferred benefit, such differences . . . may be taken up as a grievance. . . ."

First, we do not believe that the plaintiffs' claim falls within the terms of the above-quoted provision since they are, at this time at least, neither applicants for a pension nor in dispute with the defendant as to whether or not they are entitled to a pension. The plaintiffs' claim is not that they have been denied their pensions, but that they have been denied the opportunity to eventually become entitled to a pension. Second, and perhaps more importantly, we believe that § 510 of ERISA has conferred on plaintiffs a statutory right independent of the collective bargaining agreement, which may be enforced in court independent of the grievance procedure.

In *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1973), the Supreme Court held that an individual's right to equal employment opportunity under Title VII was independent of an employee's non-discrimination rights under a collective bargaining agreement, and that an employee's initial resort to the grievance procedure did not preclude a later court action. The Court noted the drawbacks to submitting a statutory dispute to arbitration. These included the fact that an arbitrator is an expert in "the law of the shop, rather than the law of

the land," *id.* at 57. Furthermore, arbitrable fact finding is not usually equivalent to judicial fact finding; the rules of evidence usually do not apply; the record of the arbitration proceedings is not complete; and discovery compulsory process, cross-examination, and testimony under oath are often limited or unavailable.

Similarly, in *Barrentine v. Arkansas-Best Freight System, Inc.*, — U.S. —, 101 S.Ct. 1437 (1981), the Court concluded that an employee's right to minimum wages under the Fair Labor Standards Act, 29 U.S.C. § 201, *et seq.*, was independent of his right to collectively-bargained for wages. Thus, a Court can entertain an independent action pursuant to the FLSA, even after a grievance has been filed and processed. The Court noted:

"Not all disputes between an employee and his employer are suited for binding resolution in accordance with the procedures established by collective bargaining. While courts should defer to an arbitrable decision where the employee's claim is based on rights arising out of the collective bargaining agreement, different considerations apply where the employee's claim is based on rights arising out of a statute designed to provide minimum substantive guarantees to individual workers."

Like the minimum wage provisions of the FLSA, we find ERISA's guarantee that an employee shall not be discriminated against in order to deprive him of his pension rights to be a minimum substantive guarantee to individual workers enforceable in a court of law. *Scheider v. United States Steel Corporation*, 486 F. Supp. 211 (W.D. Pa. 1980), relied upon by the defendant, is not to the contrary. *Scheider* was not brought to secure rights protected by § 510 of ERISA but to secure rights protected by a pension plan.

The questions presented by the plaintiffs' suit, involving as they do subtle questions of intent and state of

mind, are better decided in court after a full discovery process and with the procedural safeguards provided by normal court procedures. For these reasons, the defendant's motion to dismiss is denied and its motion to stay discovery pending decision of the motion to dismiss is moot.

An appropriate Order will be issued.

Date: 3/26/82 /s/ Alan N. Bloch
ALAN N. BLOCH
United States District Judge

ORDER

AND NOW, this 26th day of March, 1982, upon consideration of Defendant's Motion to Dismiss filed in the above captioned matter on March 4, 1982,

IT IS HEREBY ORDERED that said Motion is DENIED.

/s/ Alan N. Bloch
ALAN N. BLOCH
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 81-1519

ROBERT GAVALIK, *et al.*,
Plaintiffs,

vs.

CONTINENTAL CAN COMPANY,
Defendant.

Civil Action No. 82-1995

ALBERT J. JAKUB, *et al.*, on behalf of
themselves and others similarly situated,
Plaintiffs,

vs.

CONTINENTAL CAN COMPANY,
Defendant.

MEMORANDUM OPINION

BLOCH, District J.

Plaintiffs allege in these consolidated cases that the defendant manipulated plaintiffs' length of employment in order to deprive them of certain pension benefits. Specifically, the parties' collective bargaining agreement provides for the payment of an "early pension"—referred to as the Rule of 65 and 70/75 Plans—in the event of a plant shutdown or permanent layoff. Only those employees who have the 20 years of experience necessary under the Rule of 65 Plan and the 15 years of experience necessary under the 70/75 Plan, combined

with an age factor, are eligible for the benefits. Plaintiffs complain that the defendant closed a division of its West Mifflin plant for the purpose of laying off plaintiffs prior to their entitlement to these benefits. Furthermore, the plaintiffs contend that the defendant continued to meet its production needs thereafter by working its employees overtime to avoid calling the plaintiffs back to work.

This action is brought pursuant to § 510 of the Employment Retirement Income Security Act of 1974 (hereinafter referred to as "ERISA"), 29 U.S.C. § 1140, which provides that "[i]t shall be unlawful for any person to discharge, fine, suspend, expel, discipline or discriminate against a participant or beneficiary . . . for the purpose of interfering with the attainment of any right to which such participant may become entitled under [an employee benefit plan.]" The defendant filed motions to dismiss on March 8, 1983, and June 15, 1983, in Civil Action No. 82-1995, which this Court will deny.

In its motion filed on March 8, 1983, the defendant seeks dismissal on various grounds. The first asserted basis for dismissal is that the complaint fails to state a cause of action because the Rule 65 and 70/75 Plans do not fall within 29 U.S.C. § 1140. Without doubt, these plans do fall within the statutory definition of "employee benefit plan." 29 U.S.C. § 1002(3). *See also Kross v. Western Electric Co., Inc.*, 701 F.2d 1238, 1241-43 (7th Cir. 1983).

Defendant's second basis for moving for dismissal is that the complaint fails to state a cause of action because ERISA does not preclude consideration of operating costs, including pensions, in the management of a business. This statement of the issue does not accurately reflect the complaint. Plaintiffs are asserting that defendant deliberately followed a plan for avoiding pension liability as a means of increasing its profits, not that it deliberately

increased plant profitability by a means that happened to effect employees' eligibility for pension benefits. The former conduct is a violation of ERISA; the latter conduct is not charged by the plaintiffs.

For its next ground for dismissal, defendant raises the plaintiffs' failure to exhaust their remedies. This contention has been previously rejected by this Court in its opinion in Civil Action No. 81-1519, which has since been consolidated with this case. This Court recognizes that the Seventh Circuit subsequently reached the opposite result in *Kross v. Western Electric Co., Inc.*, 710 F.2d 1238, 1243-45 (1983). Also this Court is well aware of the Third Circuit's frequent admonitions that "[i]f there is any expression of public policy pertaining to labor-management relations that has emerged loud and clear in today's jurisprudence it is the national policy favoring arbitration of labor disputes." However, after a thorough review of the opinion in Civil Action No. 81-1519, the *Kross* decision, and Third Circuit law on the arbitrability of labor disputes, this Court reaffirms its decision in Civil Action No. 81-1519 and holds it applicable to its companion case, Civil Action No. 82-1995.

The final ground for dismissal asserted in the first motion is that this action is barred by the statute of limitations. Both parties agree that 29 U.S.C. § 1132 and § 1140 do not provide a specific limitations period and that the appropriate period is determined by reference to the state statute of limitations governing cases most analogous to the cause of action asserted by the plaintiffs. Defendant first argues that the Supreme Court decision of *DelCostello v. International Brotherhood of Teamsters*, — U.S. —, 51 U.S.L.W. 4693 (June 8, 1983) mandates the application of a six-month statute of limitation. Since *DelCostello* dealt with the statutory limitation to be applied to actions filed after binding arbitration, it is wholly inapplicable to this case. Defendant's next contention is that the two-year statute of limitations which

governs actions for intentional interference with contractual relations is most analogous to this action. This Court disagrees, concluding that the cause of action alleged by plaintiffs is most analogous either to an action charging employment discrimination or a suit alleging breach of a fiduciary duty, both of which are subject to the 6-year residuary period of limitations set forth in 42 Pa.C.S.A. § 5527(6). See *Knoll v. Springfield Township School District*, 699 F.2d 137, 145 (3d Cir. 1983) (appeal pending); *Weisen v. Reichett*, — F. Supp. —, 111 LLRM 3136 (W.D. Pa. 1982).

The plaintiffs filed suit on September 27, 1982, alleging that discriminatory layoffs of defendant's employees to avoid pension liabilities began in 1976 and continued until the relocation of the pail line in the winter of 1977-1978. From the face of the complaint, the Court is unable to determine whether the discriminatory layoffs of any of the named plaintiffs occurred prior to September 27, 1976. The defendant, as the moving party, has the burden of proving that the statute of limitations bars this action, and defendant has failed to come forward with evidence to support its contention.¹

* * *

[The Court here addressed an unrelated motion]

An appropriate Order will be issued.

/s/ Alan N. Bloch
ALAN N. BLOCH
United States District Judge

Date: 12/15/83

¹ The Court has reviewed a pending motion for class certification and found the proposed class poorly defined. The Court recognizes that the issue of when the statute of limitations begins to run may need to be addressed in setting the temporal limitations of any class which may be certified subsequently.

JUN 5 1987

JOSEPH F. SPANIOLO, JR.
CLERK

3
No. 86-1659

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

CONTINENTAL CAN COMPANY,

Petitioner,

v.

ROBERT GAVALIK, *et al.*,

Respondents,

-and-

CONTINENTAL CAN COMPANY, a
member of THE CONTINENTAL GROUP, INC.

Petitioner,

v.

ALBERT JAKUB, *et al.*, on behalf of themselves and
others similarly situated.

Respondents.

**REPLY BRIEF IN SUPPORT OF PETITION FOR A
WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT**

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Note: Please see Petition for a listing of the parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates of the petitioner, Continental Can Company.

Petitioner submits this brief in reply to respondents' brief in opposition to the petition for a writ of *certiorari*. As is reviewed in the petition and further elaborated below, there are important and urgent reasons for the Court to grant *certiorari* in this case.

I. Exhaustion

Respondents admit that the circuit courts are in conflict over the legal issue of whether exhaustion is required in an ERISA section 510 (29 U.S.C. §1140) situation. Nonetheless, they seek to ignore the impact of the exhaustion issue by asserting that the underlying collective bargaining agreement (CBA) does not cover the existing dispute. Respondents failed to indicate that another circuit, examining the identical CBA, found the dispute to be covered by it. *Mason v. Continental Group, Inc.*, 763 F.2d 1219 (11th Cir. 1985), *cert. denied*, 106 S. Ct. 863 (1986).

A. The Circuit Conflict Discussed in the Petition Directly Affects This Action.

The respondents admit that there is conflict among the circuits over the issue of whether section 510 claims must be arbitrated. Then they attempt to distinguish on factual grounds the present case from the Seventh and Eleventh Circuit decisions that required plaintiffs to arbitrate section 510 claims.¹ They argue that those decisions are not applicable to this case "because [here] there *were* no pension plan remedies that plaintiffs could invoke." Brief for Respondents in Opposition [hereinafter referred to as *Opp.*] at 11. Standing square in the way of the arguments of the respondents are the actual facts.

In *Mason*, the Eleventh Circuit panel addressed claims against Continental based on section 510 of ERISA that

¹ *Dale v. Chicago Tribune Co.*, 797 F.2d 458 (7th Cir. 1986), *cert. denied*, 107 S. Ct. 954 (1987); *Mason v. Continental Group, Inc.*; and *Kross v. Western Elec. Co.*, 701 F.2d 1238 (7th Cir. 1983).

were virtually the same as those raised by the present respondents. The collective bargaining agreement that provided the arbitration mechanism considered by the Eleventh Circuit was identical to that providing an arbitration mechanism to the respondents here. Both were negotiated between the United Steelworkers, the union representing the plaintiffs in both cases, and the petitioner. Thus the actual facts discredit the basic argument of the respondents in support of their opposition to the granting of a writ by this Court in this action.²

² The respondents also make a number of peripheral assertions that are incorrect: they assert that the governing pension plan does not forbid the behavior complained of by the respondents. The governing Pension Agreement contains terms that forbid the conduct alleged by the respondents. Through collective bargaining, the parties created the terms and conditions of the pension rights at issue here including procedures for the enforcement of pension rights as well as the substantive prohibition contained in section 510: "The company may not fire you or discriminate against you to prevent you from obtaining a pension or deferred vested benefit to which you are entitled under the Plan or keep you from exercising your rights under ERISA." *Petition* at 124a.

The Pension Agreement also provides a remedy for the type of claims made here: "Any differences that may arise between you and the company concerning . . . your entitlement to . . . (a) pension . . . may be taken up as a grievance in accordance with the applicable provisions of the Master Agreement." *Petition* at 120a.

The parties were also mindful of the requirements of ERISA when they negotiated the Pension Agreement. The pension plan is expressly made to conform to ERISA:

The plan has been amended to conform to the provisions of the Employee Retirement Income Security Act of 1974 (ERISA) and any differences between the provisions of the plan and the present or future requirements of ERISA will be deemed to be resolved in conformance with the requirements of ERISA.

Petition at 119a.

The respondents assert (at 13-14) that the Pension Agreement is separate from the Master Agreement. In fact, the Pension Agreement recites that it is part of the Master Agreement. *Petition* at 118a. Also,

B. These Conflicts Between the Circuits Clearly Warrant This Court's Review.

Respondents also argue that there are additional reasons why this Court should not grant a writ. These arguments suffer from factual deficiencies similar to those of their first argument,³ and they tend to obscure the real importance of this issue. The Eleventh Circuit decision in *Mason* coupled with a recent decision in the federal district court for New Jersey highlight the problems caused by the unresolved question of exhaustion in the context of ERISA.

On June 21, 1985, the Eleventh Circuit dismissed the claims of plaintiffs from a Continental plant located in Alabama for failure to exhaust their arbitral remedies. *Mason* at 1219. On January 15, 1987, the Third Circuit found in this case that plaintiffs from another Continental plant in Pittsburgh, Pennsylvania, did not need to exhaust their arbitral remedies and made a phase one liability determination against Continental. *Gavalik v. Continental Can Co.*, 812 F.2d 834 (3d Cir. 1987). On May 28, 1987, Judge Sarokin of New Jersey in a class action involving employees of Continental at plants all over the United

at 119a, Article 23 of the Master Agreement incorporates the Pension Agreement by reference. And the Appeals procedure of the Pension Agreement at 117a expressly provides for taking disputes up "as a grievance in accordance with the applicable provisions of the Master Agreement."

³ The respondents argue that in time the Seventh and Eleventh Circuits may reverse their "incorrect" decisions. They note two district court cases in which the court called into question the decision in *Kross*. They fail to note the recent Seventh Circuit decision in *Dale v. Chicago Tribune Co.*, 797 F.2d 458 (7th Cir. 1986), *cert. denied*, 107 S. Ct. 954 (1987) re-affirming *Kross*. Thus there is no immediate likelihood that that circuit will reverse itself.

They also attempt to argue that the legislative history of ERISA demonstrates that the legislators intended to preclude arbitration of ERISA-based claims. This argument is plainly without merit. See the *Petition* at 12-14.

States, including some located in the Eleventh Circuit, also made a phase one determination of liability against Continental. *McLendon v. Continental Group, Inc.*, No. 83-1340 (D.N.J. May 28, 1987) (order and opinion granting Plaintiffs' Motion for Partial Summary Judgment). The court's finding was based on the alleged collateral estoppel effects of the Third Circuit decision in *Gavalik*. The petitioner has incurred extensive litigation and other costs because of the very differences in circuit decisions that this Court should address.

Thus, in spite of the respondents' averments that the differences in circuit positions have little practical effect, this case and other cases against Continental demonstrate the critical nature of the issue. Moreover, as this Court is well aware, Continental's situation is typical of a large number of the companies in America—companies with multiple plants whose employees work under a master collective bargaining agreement that incorporates a pension plan agreement which has been negotiated with a national union.

II. The Statute of Limitations

Respondents claim that every section 510 decision to date has borrowed from state law to arrive at the appropriate SOL, that analogies to either *DelCostello v. Teamsters*, 462 U.S. 151 (1983) or *Wilson v. Garcia*, 471 U.S. 261 (1985) "have nothing to commend them" or make "no sense", and that the Supreme Court has no interest in examining "a question of state law" as to which the District Court and the Third Circuit were in "unanimity". *Opp.* at 19-20.

Even if, *arguendo*, state law provides the SOL, the Third Circuit's holding is fatally deficient. As shown in the Petition, the Third Circuit's interpretation of Pennsylvania law is in direct conflict with all state court decisions on the issue, and with two prior Third Circuit opinions. Respondents made no effort to show why this Court, in

the exercise of its supervisory authority, should not compel the circuit to heed current Pennsylvania law and its own precedent in selecting an SOL.

Respondents' opposition ignores the conflict now existing among the courts. *Petition* at 17. This state of confusion is especially damaging where the issues affect industry-based nationwide bargaining agreements.⁴ As matters stand now, workers subject to the same bargaining agreement, even facing the same employer, may nevertheless have rights that differ from jurisdiction to jurisdiction. This confusion, and the improbably long SOL selected by the *Gavalik* court, calling into question employment decisions made many years ago and involving collective bargaining agreements renegotiated every three years, are also in clear conflict with the federal policies of promoting uniformity and rapid conflict resolution where collective bargaining and private settlement of disputes are concerned. None of these points was addressed in respondents' opposition.

A. The Analogy to Federal Discrimination Actions and the Question of the Applicable State Law

It was the district court that first analogized to federal employment discrimination actions under section 1983. *Petition* at 21. After *Wilson*, however, these actions (whether based in employment situations or not) became subject to a two-year SOL in Pennsylvania. *Id.* Moreover, pursuant to the 1978 changes in the Pennsylvania SOL, and as recognized by several Pennsylvania state courts and by the Third Circuit itself on two separate occasions, state law actions for the tort of *interference with or injury to economic rights* (the state law analogy used by the Third Circuit before *Wilson* to determine the SOL in employment

⁴ See, e.g., *Coordinating Committee Steel Companies and United Steelworkers of America*, 78-1 Labor Arbitration Awards (CCH) ¶ 8216 (1978) (Aaron, Arb.) (describing the negotiation process for rule of 65 pension benefits in the steel industry, referring to a similar agreement in the can and aluminum industries).

discrimination claims) became subject to a two-year SOL as well. *Petition* at 24.⁵

Far from being "in unanimity" on the matter of the applicable state law, neither the district court nor the appellate court properly considered the question. The *only* state court decisions discussing the SOL applicable to torts for interference with economic rights unanimously adopt the two year period. *Petition* at 24; *Goodman* at 120, n.2.⁶

In conclusion, the Third Circuit must either adopt an analogy to federal discrimination actions *as such*, in which case *Wilson* imposes a two-year SOL,⁷ or it must follow the *further* analogy espoused by its own precedent to find

⁵ See also *Goodman v. Lukens Steel Co.*, 777 F.2d 113, 120 n.2 (3d Cir. 1985) (opinion on rehearing en banc) ("Claims for injury to economic rights, as well as for personal injuries, are currently subject to a two year limitation."), *cert. granted*, 107 S. Ct. 568 (1986); *Monkelis v. Scientific Systems Services*, 653 F. Supp. 680 (W.D. Pa. 1987) (two-year SOL applied to employment discharge action) and *Garcia v. Community Legal Services*, 524 A.2d 980 (Pa. Super. Ct. 1987).

⁶ The district court cited to a federal discrimination action only. The *Gavalik* opinion, at 843, cites *Ulloa v. City of Philadelphia*, 95 F.R.D. 109, 114 (E.D. Pa. 1982), which correctly holds that employment discrimination actions must be analogized to wrongful interference with economic rights. *Ulloa*, however, concluded, without analysis or support, that such actions were subject to a 6-year limitation period. This conclusion is directly contradicted by the Third Circuit in *Mazzanti v. Merck and Co.*, 770 F.2d 34 (3d Cir. 1985) and *Goodman*, and by the decisions of the state courts. The single state court decision cited by *Gavalik* expressly states that the SOL was not a matter of dispute. *Petition* at 23, n.14; *Gavalik* at 843 (*Petition* 18a). See also *Garcia v. Community Legal Services*, 524 A.2d 980 (citing *Mazzanti* with approval) and *Monkelis*.

⁷ In *Saint Francis College v. Al-Khazraji*, 55 U.S.L.W. 4626 (U.S. May 18, 1987) (No. 85-2169), this Court affirmed the Third Circuit's refusal to retroactively apply *Wilson* to a section 1981 action, where Third Circuit precedent at the time the action was brought supported a six-year statute. These concerns do not apply in the present action, where there was no precedent upon which the respondents could reasonably have relied. *Petition* at 22, n.13.

the state SOL applicable to federal employment discrimination actions, in which case the two-year statute for injury to economic rights applies.

B. The DelCostello Analogy

While it is true that "state law remains the norm for borrowing limitations periods," *DelCostello* at 171, respondents' quotation of that language does not eliminate the need to analyze whether federal policy requires a federal SOL solution. When "a rule from elsewhere in federal law clearly provides a closer analogy than available state statutes, and when the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial lawmaking" the courts "have not hesitated" to turn to federal law instead. *DelCostello* at 172. Respondents' "argument" blithely ignores that Congress itself drew a close parallel between actions under section 510 and unfair labor practice charges. *Petition* at 18-19. It also ignores the strong federal policies in favor of uniformity and rapid conflict resolution, adopted in *DelCostello* as the basis for applying a short uniform federal statute, that are equally present here, where respondents are attempting to resurrect issues that should have been settled years ago within the grievance mechanism provided by the collective bargaining agreement. Finally, it ignores the broad range of legal actions and fact situations in which courts have applied the period adopted by *DelCostello*.⁸

III. The "Same Decision" Test

With regard to the critical issue of whether defendants in a discrimination action are entitled to present "same

⁸ See, e.g., *Int. Bhd. of Elec. Workers v. Hechler*, 107 S.Ct. 2161 (1987) (Stevens, J., dissenting) (*DelCostello* is applicable to an action against the union only); *West v. Conrail*, 107 S. Ct. 1538 (1987) (for purposes of applying the *DelCostello* SOL there is no difference between an action under the Railway Labor Act or an action under section 301 of the Labor Management Relations Act). See also *Petition* at 20, n.12.

decision" evidence as an affirmative defense in the liability phase of the case, respondents attempt to mischaracterize the "same decision" issue as the "but for" issue. In so doing, respondents totally ignore *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977) and its progeny and instead rely on two cases of this Court which do not address the issue presented. *Opp.* at 20-21.

Respondents erroneously assert that not a single district or appellate court has embraced the theories petitioner espouses. *Opp.* at 8. In reality, the Third Circuit stands virtually alone both in applying the "same decision" test in the second, or remedial, phase of the case and also in its "a determinative factor" test. The circuit is thus in conflict with *Mt. Healthy* which teaches that plaintiffs must first present evidence establishing that the proscribed factor was a "motivating" or "substantial" factor and that the defendant is then entitled to present "same decision" evidence as an affirmative defense to liability. *Id.* at 285-287.

The other circuits have adopted this Court's *Mt. Healthy* standard in the liability phase of all types of mixed-motive discrimination cases with the exception of the Eighth Circuit and the D.C. Circuit in Title VII cases.⁹

⁹ See, e.g., *Wright Line*, 251 N.L.R.B. 1083 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982); *Davis v. State Univ. of New York*, 802 F.2d 638 (2d Cir. 1986); *Whalen v. Roanoke County Bd. of Supervisors*, 769 F.2d 221, 224 (4th Cir. 1985), *aff'd on rehearing*, 797 F.2d 170 (4th Cir. 1986) (per curiam); *Peters v. City of Shreveport*, No. 86-4608 (5th Cir. May 26, 1987); *Blalock v. Metals Trades, Inc.*, 775 F.2d 703 (6th Cir. 1985); *Greenberg v. Kmetko*, 811 F.2d 1057, 1064 (7th Cir. 1987); *Barnes v. Bosley*, 745 F.2d 501, 507 (8th Cir. 1984), *cert. denied*, 105 S.Ct. 2022 (1985), *but see Bibbs v. Block*, 778 F.2d 1318 (8th Cir. 1985) (en banc); *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159, 1163 (9th Cir. 1984); *Brown v. Reardon*, 770 F.2d 896, 905 (10th Cir. 1985); *Thompkins v. Morris Brown College*, 752 F.2d 558 (11th Cir. 1985); *Passaic Daily News v. NLRB*, 736 F.2d 1543, 1552 (D.C. Cir. 1984), *but see Toney v. Block*, 705 F.2d 1364, 1370 (D.C. Cir. 1983) (Tamm, J., concurring).

The importance of conducting the "same decision" test as to liability is readily apparent given the deleterious impact which results from a finding of liability. For example, partial summary judgment was recently granted in *McLendon v. Continental*, based on the alleged collateral estoppel effect of the liability holding in *Gavalik*. *McLendon* is a nation-wide class action which like *Gavalik* was filed on behalf of former employees of Continental by counsel retained by the United Steelworkers Union with the union paying costs.

The prejudice to Continental which has accrued is doubly offensive on due process grounds because such a finding of liability can only occur in bifurcated class actions. It is a denial of due process both to foreclose an "affirmative defense" (*NLRB v. Transp. Management Corp.*, 462 U.S. 393, 400 (1983)) and to expose a defendant to a finding of liability in a class action case when such exposure could not have occurred in a non-bifurcated case involving a single plaintiff.

Not only have respondents chosen to ignore *Mt. Healthy*, but their reliance on *Franks v. Bowman Transp. Co.*, 424 U.S. 747 (1976) and *Teamsters v. United States*, 431 U.S. 324 (1977) is misplaced. *Franks* and *Teamsters* stand for an undisputed proposition concerning relief to the class *after* liability is determined. The issue presented here is whether a defendant is entitled to defeat liability by proving *before* the merits are reached that the "same decision" would have been made. See *Mt. Healthy*, 429 U.S. 274; *Arlington Heights v. Metro Housing Corp.*, 429 U.S. 252 (1977); *Givhan v. Western Line Consol. School Dist.*, 439 U.S. 410 (1979); *East Texas Motor Freight Inc. v. Rodriguez*, 431 U.S. 395, 403 n.9 (1977) and *Hunter v. Underwood*, 471 U.S. 222 (1985).

Mt. Healthy's "same decision" test is a rule of causation which was not at issue in either *Franks* or *Teamsters* and goes to liability, not damages. Respondents do not contest

that the Third Circuit only permits Continental's "same decision" defense to be presented in the damages phase of the case. They fail to address this issue and argue instead that *Franks* and *Teamsters* were faithfully applied because Continental will be permitted to limit damages to individual respondents. Respondents ignore *Mt. Healthy* since they cannot rebut its application.

This Court should recognize the centrally important fact that the Third Circuit's decision conflicts with the express terms of ERISA. Section 510 makes unlawful employer actions taken "for the purpose of interfering with" the attainment of pension benefits. *Petition* at 100a.

The Third Circuit found liability based on a showing by respondents that the proscribed motive was "a determinative factor." Liability was so found even though petitioner had proved at trial that the "same decisions" would have been made for legitimate business reasons. Therefore, the actions were not taken "for the purpose of interfering with" the attainment of pension benefits.

This Court should grant *certiorari* to reconcile the Third Circuit's conflict with the express terms of the statute and to resolve the Third Circuit's conflict with this Court's decision in *Mt. Healthy*.

Conclusion

For all these reasons, to resolve the conflicts between circuits and with decisions of this Court, the petitioner urges this Court to grant its *Petition* for a Writ of *Certiorari*.

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No. 86-1659

Supreme Court, U.S.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1987

CONTINENTAL CAN COMPANY,

Petitioner,

v.

ROBERT GAVALIK, *et al.*,

Respondents,

-and-

CONTINENTAL CAN COMPANY, A
MEMBER OF THE CONTINENTAL GROUP, INC.

Petitioner,

v.

ALBERT JAKUB, *et al.*,
ON BEHALF OF THEMSELVES AND
OTHERS SIMILARLY SITUATED,

Respondents.

**SUPPLEMENTAL BRIEF IN SUPPORT OF
PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

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**SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION
FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE THIRD
CIRCUIT**

The Continental Can Company, petitioner in the above-captioned case, files this supplemental brief to call this Court's attention to a series of recent decisions by this Court which lend support to a number of the positions the company has asserted in its Petition.

I. Arbitration

The Court's decision in *Shearson/American Express, Inc. v. McMahon*, 55 U.S.L.W. 4757 (U.S. June 8, 1987), strongly supports Continental's position that the claims of the respondents should have been arbitrated. Continental has shown that the proper test to be applied in an international dispute to a statutory right in order to determine whether that right is arbitrable is described in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* 473 U.S. 614 (1985) and asserted that the same test is applicable to domestic disputes. In *Shearson/American Express, Inc.*, the Court found in a case involving a domestic dispute that "[a]lthough the holding in *Mitsubishi* was limited to the international context, . . . much of its reasoning is equally applicable here." *Id.* at 4762. The Court applied the *Mitsubishi* test to domestic claims arising under two statutes, the Securities Exchange Act of 1934 (Exchange Act), 15 U.S.C. § 78a *et seq.*, and the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961 *et seq.*, finding that rights under both statutes were arbitrable.

There is also an important implication of the Court's decision in *Shearson/American Express, Inc.* The

Court quotes the arbitration provision at issue at the beginning of its opinion:

Unless unenforceable due to federal or state law, any controversy arising out of or relating to my accounts, to transactions with you for me or to this agreement or the breach thereof, shall be settled by arbitration in accordance with the rules, then in effect, of the National Association of Securities Dealers, Inc. . . .

Id. at 4757. This is a broad coverage clause that contains only general language. It contains no specific reference to claims under the Exchange Act or under RICO. Although the Court addressed only one prong of the *Mitsubishi* test in its consideration of these statutes (finding no legislative intent that would preclude arbitration of statutory rights under either of the two), the Court also implied it would be possible for an arbitrator acting under such a provision to consider Exchange Act or RICO claims. If this were not so, the Court presumably would have dismissed the case for lack of coverage as it did in *Iowa Beef Packers, Inc. v. Thompson*, 405 U.S. 228 (1972).

The respondents in *Shearson/American Express, Inc.* noted that "the so-called customer agreement containing these standard arbitration clauses is not an agreement as between industry professionals but between brokerage professionals and the ordinary customer with typically no bargaining power as to the contents of the form agreement." Respondents' Brief in Opposition to the Petition for a Writ of Certiorari at 20 (filed August 13, 1986). While making allowance for legitimate advocacy and keeping in mind the fact

that the lower court found that the contract was not a contract of adhesion, it appears the agreement was not one that derived from extensive bargaining between equal parties.

The collective bargaining agreement between the Petitioner and the union representing the Respondents in the present action was, of course, the well-considered result of extended bargaining and negotiation between the two. Because this Court has found by implication that a standard arbitration clause in a commercial agreement covered claims based on the complex technical requirements for a civil RICO claim, it should be even more willing to find that the bargained-for grievance procedure of a collective-bargaining agreement designed to "erect a system of industrial self-government" where "[a]rbitration is the means of solving the unforeseeable" (*USW v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 580-81 (1960)) encompasses claims based on the relatively straightforward requirements for relief based on the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001 *et seq.* The Court's treatment of arbitrability in *Shearson/American Express, Inc.* makes it clear that ERISA-based claims fall under the coverage of a broad, non-specific, arbitration provision.

The strong support for arbitral remedies evinced by this recent decision makes more compelling the need for this Court to resolve the disagreement among circuits over the question of the arbitrability of rights arising under ERISA.

II. Statutes of Limitations

Two other recent Supreme Court decisions, *Agency Holding Corp. v. Malley-Duff and Assocs.*, 55 U.S.L.W.

4952 (U.S. June 22, 1987) and *Goodman v. Lukens Steel Co.*, 55 U.S.L.W. 4881 (U.S. June 19, 1987), vindicate the validity of the legal arguments made by Continental with respect to the statute of limitations (SOL) applicable to claims under Section 510 of ERISA, 29 U.S.C. § 1140: (1) federal analogies are especially appropriate where the claim involves several states; (2) an analogy to federal discrimination claims is a valid alternative, as is the six-month period of the NLRA; (3) state catchall limitation periods do not reflect congressional intent, may not be available, and may frustrate federal policy; (4) a shorter limitation period is retroactively applicable to plaintiffs' claims.

A. Agency Holding Corp. v. Malley-Duff and Assocs.

In *Malley-Duff* the Supreme Court reversed the Third Circuit and applied the four-year period of civil enforcement actions under the Clayton Anti-Trust Act, 15 U.S.C. § 15b, to RICO civil enforcement actions.

The decision is important because it affirms the principle explicated in *DelCostello v. Int'l Bhd. of Teamsters*, 462 U.S. 151 (1983) that courts may borrow from federal law instead of state law when the federal SOL provides a "closer analogy", and "when the federal policies at stake and the practicalities of litigation" make the federal SOL more appropriate. *Malley-Duff*, 55 U.S.L.W. at 4953, quoting *DelCostello*, 462 U.S. at 172.

In support of a federal SOL, the Court pointed to the interstate nature of RICO claims: "As this case itself illustrates, RICO cases commonly involve interstate transactions, and conceivably the statute of limitations of several States could govern any given RICO claim." *Malley-Duff* at 4955. The Court concluded as follows:

The multistate nature of RICO indicates the desirability of a uniform federal statute of limitations. With the possibility of multiple state limitations, the use of state statutes would present the danger of forum shopping and, at the very least, would "virtually guarantee[e] . . . complex and expensive litigation over what should be a straightforward matter."

Id. at 4955, *quoting* the Report of the Ad Hoc Civil RICO Task Force of the ABA Section of Corporation, Banking and Business Law (1985) [hereinafter RICO report] at 392.

The Court's rationale supports Continental's selection of the six-month limitation period of section 10(b) of the National Labor Relations Act (NLRA), as amended, 29 U.S.C. § 160(b), or its alternative selection of the two-year period applied to federal discrimination claims under 42 U.S.C. §§ 1981 and 1983. As Continental stated in its petition, "[t]he lack of direct guidance on a limitations period for ERISA-based claims has resulted in confusion among the courts, considerable opportunity for forum shopping and great uncertainty for private litigants." Petition at 17-18. *See also* Petition at 19-20 and at 22 and *Fort Halifax Packing Co. v. Coyne*, 107 S. Ct. 2211 (June 1, 1987) (emphasizing the need to vigorously apply the ERISA preemption provisions where applying state law would endanger the uniform application of ERISA).

In support of its selection of the four-year period of the Clayton Act in *Malley-Duff*, the Supreme Court referred to similarities between the Clayton Act and

RICO. 55 U.S.L.W. at 4954-55. Similarly, the legislative history of ERISA highlights the similarity between Section 510 actions and charges of unfair labor practices under the NLRA. 119 Cong. Rec. 30,374 (1973), *reprinted in* Senate Comm. on Labor and Public Welfare, Subcomm. on Labor, 94th Cong., 2d Sess., Legislative History of the Employee Retirement Income Security Act of 1974 (Comm. Print 1976) ("Leg. His.") at 1775, and discrimination suits, 119 Cong. Rec. 30,044 (1973), *reprinted in* Leg. His. at 1641. See Petition at 18 and 21-22.

Malley-Duff is also important because it affirms the Court's rejection of the use of "catchall" limitation periods where it is "unlikely that Congress would have intended such a statute of limitations to apply." *Malley-Duff*, 55 U.S.L.W. at 4955 (citing *Wilson v. Garcia*, 471 U.S. 261, 278 (1985)).

The Court rejected catchall periods in *Wilson v. Garcia*, 471 U.S. at 278, and instead selected the state statute of limitations applicable to personal injury claims. In *Malley-Duff* catchall periods were rejected again. One reason offered by the Court was that not all states have catchall statutes. *Malley-Duff*, 55 U.S.L.W. at 4955 (citing RICO Report at 391). In addition the Court found that while the personal injury period "minimized the risk" that the choice of a state limitation period would not fairly serve the federal interests involved in § 1983 discrimination actions, *id.*, "a similar statement could not be made with confidence about RICO and state statutory 'catchalls' [sic]". *Id.*, quoting *A.J. Cunningham Packing Corp. v. Congress Financial Corp.*, 792 F.2d 330, 339 (3d Cir. 1986) (Sloviter, J., concurring).

The same reasoning applies to the use of catchall periods in ERISA discrimination actions. Not all states have catchall statutes. Moreover, catchall statutes, because of their length, would not fairly serve the federal interest in rapid resolution of labor conflicts.

B. *Goodman v. Lukens Steel Company*

In *Wilson v. Garcia*, 471 U.S. 261 (1985), the Supreme Court held that all discrimination actions, under 42 U.S.C. § 1983 regardless of the nature of the underlying wrongs, were subject to the states' statutes of limitations for personal injury actions. *Goodman*, affirming the Third Circuit's opinion, extended this holding to § 1981 discrimination actions.

Goodman applied the *Garcia* limitation period to § 1981 claims because both § 1981 and § 1983 are "part of a federal law barring racial discrimination" which is "a fundamental injury to the individual rights of a person". 55 U.S.L.W. at 4882. Application of the same SOL to ERISA discrimination actions is suggested by the legislative history of ERISA, Petition at 21-22, and entirely conforms to the policy of the Supreme Court as explained in *DelCostello* and *Malley-Duff*, to analogize to federal law if federal law provides a closer analogy, and the federal policies at stake and the practicalities of litigation make a federal rule a more appropriate vehicle for interstitial lawmaking.¹

¹ Thus, the *Gavalik* decision also appears to be at odds with the Third Circuit's prior opinion in *Goodman v. Lukens*, applying *Garcia* to a § 1981 employment discrimination claim. But see *Gavalik v. Continental Can Co.*, 812 F.2d 834, 845, n.21 (3d Cir. 1987), petition for cert. filed, 55 U.S.L.W. 3752 (U.S. April 15, 1987) (Petition at 21a), where the court argues that its prior opinion in *Goodman* highlights the limitations of *Garcia*.

Goodman, however, is also significant for its application of the principles established in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971). *Goodman* affirms the *Chevron* rule that cases "should be decided in accordance with the law existing at the time of decision." 55 USLW at 4882. Nonretroactivity is appropriate only in "certain defined circumstances." *Id.* Thus, a shorter SOL should be applied retroactively unless it overrules clear precedent on which the complaining party was entitled to rely, the purpose of the change in the law would not be served, and retroactive application would be inequitable. *Id.*

Application of the principles enunciated in *Chevron* and *Goodman* compels the retroactive application of a shorter SOL to the *Gavalik* plaintiffs.

Whatever the state of the law with respect to § 1981 or 1983 discrimination actions², when plaintiffs

² The Third Circuit applied the *Chevron* test to § 1983 in *Smith v. City of Pittsburgh*, 764 F.2d 188 (3d Cir.), cert. denied, 106 S.Ct. 349 (1985). Plaintiff Smith brought his employment discrimination action in March of 1982. The court concluded that in 1982 there was no precedent establishing a six-year limitation period for employment discrimination actions under section 1983 (several decisions instead applied a two-year or a six-month limitation period), and that such precedent did not arise until its decisions in *Perri v. Aytch*, 724 F.2d 362, 368 (3d Cir. 1983) and *Knoll v. Springfield Township School District*, 699 F.2d 137 (3d Cir. 1983), vacated, 471 U.S. 288 (1985). *Smith v. City of Pittsburgh*, 764 F.2d at 195.

Whether plaintiffs when they brought their action in 1981 could justifiably have relied on the application of a six-year SOL to § 1981 employment discrimination actions is not clear. The Third Circuit in *Al-Khazraji v. Saint-Francis College*, 784 F.2d 505, 511 (3d Cir. 1986) (citing *Meyers v. Pennypack Woods Home Ownership Ass'n*, 559 F.2d 894 (3d Cir. 1977) and *Wilson v. Sharon Steel Corp.*, 549 F.2d 276 (3d Cir. 1977)), *aff'd*, 107 S. Ct. 2022 (1987) found that "[t]his Circuit,

brought their actions in 1981 and 1982, there was no precedent upon which plaintiffs could have relied indicating that a six-year SOL applied to their ERISA discrimination claims.

III. Conclusion

These recent decisions highlight the errors committed by the Third Circuit in interpreting ERISA. As the Court is aware, ERISA affects the lives of millions of workers and the business of thousands of corporations. The circuit court below has ruled in a manner that conflicts with a number of Supreme Court decisions and with the rulings of fellow circuits.

from at least 1977 until 1985, had applied Pennsylvania's six-year statute of limitations in discrimination cases brought under Section 1981." Citing *Smith v. City of Pittsburgh*, the court added that "unlike the state of the law regarding the proper limitations period for Section 1983 actions" precedents in 1978 for § 1981 actions were sufficiently clear that plaintiffs justifiably could expect the six-year statute to apply, *id.* at 513, and that the 1978 changes in the Pennsylvania law did not change that conclusion., *Id.*, n.10. This conclusion appears irreconcilable, however, with the Court's holding in *Smith v. City of Pittsburgh* that "[a]s of [March 1982], this court had not chosen the appropriate Pennsylvania statute of limitations for a claim of unconstitutional termination of employment without due process", 764 F.2d at 195, and its conclusion that plaintiffs could not justifiably have relied on such pre-1978 employment discrimination cases as *Davis v. United States Steel Supply*, 581 F.2d 335, 338 (3d. Cir. 1978) (six-year limit applies to section 1983 claim of unlawful discharge on the basis of race), *cert. denied*, 460 U.S. 1014 (1983) or *Sleehan v. City of Bloomsburg State College*, 590 F.2d 470, 477 (3d Cir. 1978) (six-year limit applies to 1983 claim of non-renewal of employment contract), *cert. denied*, 444 U.S. 832 (1979). *Smith v. City of Pittsburgh*, 764 F.2d at 195, n.3. The fact that *Smith* concerned § 1983 actions, whereas *Al-Khazraji* dealt with § 1981 would appear irrelevant in light of the Third Circuit's past policy of determining the SOL applicable to discrimination actions solely on the basis of the underlying claims. *Id.* at 192 (citing *Polite v. Diehl*, 507 F.2d 119, 123 (3d Cir. 1974) (en banc)).

The importance of the issues and the conflict among the circuits combine to demonstrate the need for this Court to affirm the proper role of arbitration and other administrative remedies "at the very heart of the system of industrial self-government" (*USW v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581 (1960)) as legitimate mechanisms for the resolution of "all of the questions on which the parties disagree" (*id.*), including pension-related disputes, and to define an easily applied statute of limitations for ERISA-based claims.

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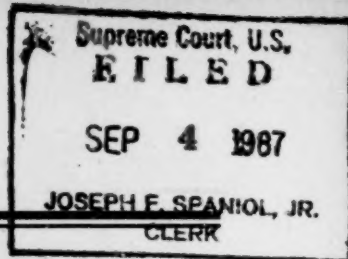
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IN THE
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OCTOBER TERM, 1987

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v.

ROBERT GAVALIK, *et al.*, and
ALBERT JAKUB, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit

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RESPONSE TO SUPPLEMENTAL BRIEF

Petitioner's supplemental brief wrongly asserts that recent decisions of the Court support petitioner's quest for *certiorari*. Those decisions are inapposite.

I. ARBITRATION

Petitioner claims that *Shearson/American Express, Inc. v. MacMahon*, 107 S. Ct. 2332 (1987), read in conjunction with *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), "strongly supports Continental's position that the claims of the respondents should have been arbitrated" (Supp. Br. 1). But even assuming that the principles respecting *commercial* arbitration announced in *Shearson* and *Mitsubishi* were applicable to *labor* arbitration—a doubtful proposition in its own right¹—those decisions would have nothing to do with the arbitral exhaustion issue presented in this case. This is so for two reasons.

1. First, in this case, unlike *Shearson* and *Mitsubishi*, there was no agreement to arbitrate statutory claims. The issue in *Shearson* and *Mitsubishi* was whether parties who had *agreed* to arbitrate statutory claims would be held to their bargain, *i.e.*, whether a lawsuit asserting statutory claims was foreclosed forever because the plaintiff had agreed that the forum for resolution of such

¹ *Shearson* and *Mitsubishi* cite no labor arbitration decisions, while, in turn, the six Supreme Court decisions rejecting any requirement of arbitral exhaustion of *employee* statutory claims (Br. Op. 9-10) cite no commercial arbitration decisions. Unlike the national policy favoring arbitration of statutory disputes in the commercial arena, *Shearson*, *supra*, the national labor policy favors arbitration only of *contractual* disputes, § 203(d) of the LMRA, 29 U.S.C. § 173(d); *Steelworkers v. American Mfg. Co.*, 363 U.S. 565, 566 (1960); *Steelworkers v. Enterprise Wheel Co.*, 363 U.S. 593, 597-99 (1960), and *disfavors* the arbitration of rights conferred upon individual employees by federal statutes. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 55-60 (1974); *Barrentine v. Arkansas-Best Motor Freight System*, 450 U.S. 728, 737-45 (1981); *McDonald v. West Branch*, 466 U.S. 284, 290-92 (1984).

claims would be arbitration. Central to the Court's resolution of those cases, was, of course, that the parties *in fact* had agreed to arbitrate statutory claims and not merely disputes over the meaning or application of their contract.²

In the instant case, as both lower courts held (Br. Op. 11-13), there was no agreement to arbitrate claims of violation of § 510 of ERISA. Indeed, the agreements here—as is customary in the case of *labor* arbitration—expressly confined the arbitrator's power to the resolution of contractual claims.³ If an arbitrator undertook to resolve a statutory claim in the face of this limitation on his/her power, the award would be invalid. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 53-54 (1974); *Barrentine v. Arkansas-Best Motor Freight System*, 450 U.S. 728, 744-45 (1981); *McDonald v. West Branch*, 466 U.S. 284, 290-91 (1984).

This case, thus, has nothing to do with the issue addressed in *Shearson* and *Mitsubishi*, *i.e.*, the court's duty when the parties *have* agreed to arbitrate statutory

² In *Shearson*, the broker and customer had agreed to arbitrate "any controversy arising out of or relating to my [the customer's] accounts, to transactions with you for me *or* to this agreement or the breach thereof," 107 S. Ct. at 2335 (emphasis added). The Court held this language—which it construed to embrace "any controversy relating to the accounts" (*id.*)—broad enough to encompass statutory as well as contractual claims. Similarly, in *Mitsubishi*, the parties had agreed to arbitrate "[a]ll disputes, controversies or differences which may arise between [Mitsubishi] and [Soler] *out of or in relation to* Articles I-B through V of this Agreement *or* for the breach thereof," 473 U.S. at 617 (emphasis added), language which the plaintiff acknowledged embraced its statutory claims "as a matter of standard contract interpretation" and which the Court interpreted accordingly, *id.* at 624 & n.13.

³ The arbitrator "shall have authority only to interpret and apply the provisions of this Agreement" (Pet. App. 126a) and "shall not have jurisdiction to alter or amend in any way the provisions of this Agreement and his decision must be in accordance with the terms of this Agreement" (*id.* 112a).

claims. This case, rather, is like *Iowa Beef Packers, Inc. v. Thompson*, 405 U.S. 228 (1972), where the Court dismissed the writ of certiorari as improvidently granted precisely because the arbitration clause did not encompass statutory disputes.⁴

2. Petitioner's reliance on *Shearson* and *Mitsubishi* is misplaced for a second reason: in those cases, the party seeking to litigate a statutory claim had *itself* agreed to arbitrate that claim. In this case, by contrast, even if the arbitration clause had encompassed statutory disputes, the employees filing this suit were not themselves parties to that arbitration agreement, and never agreed to arbitrate their statutory claims. The Company is invoking an arbitration agreement it entered into with a

⁴ Petitioner, in its Reply Brief, attempts to bring the ERISA claim under the collective bargaining agreement by *incorrectly* stating that the parties incorporated § 510 of ERISA into their agreement. Thus, petitioner states (Reply Br. at 2 n.2):

Through collective bargaining, the parties created the terms and conditions of the pension rights at issue here including . . . the substantive prohibition contained in section 510: "The company may not fire you or discriminate against you to prevent you from obtaining a pension or deferred vested benefit to which you are entitled under the Plan or keep you from exercising your rights under ERISA." *Petition* at 124a.

Petitioner has misrepresented the character of the document it relies on for this assertion, which is partially reprinted at pp. 118a-125a of the Petition. That document is *not* an agreement between the Company and Union. It is, rather, a "summary plan description," prepared unilaterally by the Company to fulfill its disclosure obligations under §§ 101-02 of ERISA, 29 U.S.C. §§ 1021-22. Department of Labor regulations require that every employer include, in its summary plan description, a statement of the protection afforded employees by § 510. *See*, 29 C.F.R. § 2520.102-3(t)(2). There is no agreement between the Company and Union in which the Company promises to comply with § 510, and thus there is no basis for the Company's contention that the Company and Union, by providing for arbitration of alleged violations of their *agreement*, have agreed to arbitrate claims that § 510 was violated.

union, not with the employees. And as this Court has repeatedly held, employees are not obliged to arbitrate claims arising under federal statutes that confer minimum substantive rights upon individual workers, *even if* their union has agreed with the employer that such statutory claims are arbitrable. *See*, Br. Op. 9-10.

Nor can it be contended that a union's agreement to arbitrate statutory claims should bind the employees on an agency theory. For unlike *contractual* claims, as to which a union serves as the employees' bargaining agent and can commit the employees to arbitration, *Vaca v. Sipes*, 386 U.S. 171, 177, 182, 184, 191 (1967), a union is *not* the bargaining agent of the employees with respect to their rights under statutes (like § 510 of ERISA) conferring minimum substantive rights. Such statutes give "individual employees a non-waivable, public law right . . . that [is] separate and distinct from the rights created through the 'majoritarian processes' of collective bargaining." *Barrentine, supra*, 450 U.S. at 737-38. Such rights "are independent of the collective bargaining process. They devolve on petitioners as individual workers, not as members of a collective organization." *Id.* at 745. "Of necessity, the rights conferred can form no part of the collective bargaining process since waiver of these rights would defeat the paramount congressional purpose." *Gardner-Denver, supra*, 415 U.S. at 51.

The crux of *Shearson* and *Mitsubishi* is that a party who agrees to arbitrate statutory claims thereby makes a choice of forum and waives the right to a judicial resolution of those claims. *See, e.g., Shearson*, 107 S. Ct. at 2337, 2339, 2346. In the instant case, neither the employees nor their union has made such a choice of forum. And even had the union agreed to arbitration of § 510 claims (which it did not), the union did not have authority to barter away the right to sue that Congress

conferred upon the employees alone.⁵ *Shearson* and *Mitsubishi* thus lend no support to petitioner.⁶

II. STATUTE OF LIMITATIONS

Petitioner's contention that recent decisions of this Court impeach the correctness of the decision below as to the applicable limitations period is unsound, as we show *infra*. Preliminarily, we note that even were there arguable substance to petitioner's contention, this case could not be the vehicle for addressing that contention. For, were a shorter limitations period rendered applicable to ERISA § 510 cases by reason of recent decisions of this Court, the shorter time limit still would not apply retroactively to this case. That is the lesson of this Court's recent decision in *Saint Francis College v. Al-Khazraji*, 107 S.Ct. 2022 (1987) (declining to decide whether *Wilson v. Garcia* controls applicable time limit in cases arising under 42 U.S.C. § 1981, because *Wilson* would not in any event apply retroactively to cases filed in reliance on longer time limit previously announced by Third Circuit).

The complaints in this consolidated case were filed in 1981 and 1982, at a time when the Third Circuit's "consistent rulings [were] that employment discrimination or wrongful discharge claims brought under federal law are

⁵ The inapplicability of *Shearson* and *Mitsubishi* is evident from yet another consideration. Those cases did not mandate *exhaustion* of arbitral remedies *prior* to suit, they held the right to sue in court had been *waived forever* by the agreement to arbitrate. Petitioner does not even *contend* that the holding of those cases applies here, *i.e.*, that plaintiffs are barred forever from bringing to court their claims under § 510 of ERISA.

⁶ A recent district court decision supports the point made at Br. Op. 15. *Treadwell v. John Hancock Mutual Life Inc. Co.*, — F.Supp. —, Civ. Ac. No. 85-3589 (D.Mass., June 25, 1987). That court in an earlier case had held arbitral exhaustion required in an ERISA § 510 action, *King v. James River-Pepperell, Inc.*, 592 F.Supp. 54 (D.Mass. 1984), but reversed itself in *Treadwell* in light of the "shift in case law since the decision in *King*," *i.e.*, the more persuasive reasoning of the opinions in *Amaro* and *Zipf*.

governed by Pennsylvania's six-year" time limit (Pet. App. 20a). See, e.g., *Davis v. United States Steel Supply*, 581 F.2d 335 (3rd Cir. 1978); *Skehan v. Board of Trustees of Bloomsburg State College*, 590 F.2d 470, 477 (3d Cir. 1978), cert. denied, 444 U.S. 832 (1979). The non-retroactivity principle of *Al-Khazraji* thus would pretermitt determination by this Court in *this* case whether a shorter time limit is applicable to ERISA § 510 actions in light of recent decisions of this Court.⁷

In any event, recent decisions of this Court do not support petitioner's quest for a shorter time limit for ERISA § 510 actions.

A. In support of its quest for certiorari to review its claim that the six-month time limit of § 10(b) of NLRA governs suits under § 510 of ERISA, petitioner's supplemental brief notes that the Court borrowed a federal rather than state statute of limitations in *Agency Holding Corp. v. Malley-Duff and Assocs.*, 107 S.Ct. 2759 (1987), to determine the time limit for civil RICO actions. But the Court reemphasized in *Malley-Duff*, as it had previously in *DelCostello v. Teamsters*, 462 U.S. 151 (1983) (see Br. Op. 19), that the borrowing of a federal time limit is a departure from the norm to be indulged only in exceptional cases:

⁷ Petitioner, at Supp. Br. 8-9, n.2, acknowledges the non-retroactivity barrier it confronts, but seeks to surmount it by reference to *Smith v. City of Pittsburgh*, 764 F.2d 188 (3rd Cir.), cert. denied, 106 S.Ct. 349 (1985). But *Smith* was a procedural due process case, not an employment discrimination case, and the Third Circuit applied *Wilson v. Garcia* retroactively in *Smith* because there had been no clear circuit precedent as to the time limit for filing procedural due process cases. See also, *Goodman v. Lukens Steel Co.*, 107 S.Ct. 2617, 2622 n.8 (retroactive application decreed in *Smith* because "the Third Circuit had not ruled definitively on which limitation period applied to the particular § 1983 claim at issue there" (emphasis added)). In that respect, of course, procedural due process cases are distinguishable from "employment discrimination or wrongful discharge" cases, as to which the "consistent rulings" of the Third Circuit were that a six-year time limit applied (Pet. App. 20a).

Given our longstanding practice of borrowing state law, and the congressional awareness of this practice, we can generally assume that Congress intends by its silence that we borrow state law. . . . [T]he mere fact that state law fails to provide a perfect analogy to the federal cause of action is never itself sufficient to justify the use of a federal statute of limitations. [*Malley-Duff*, 107 S.Ct. at 2762.]

See also, *Goodman v. Lukens Steel Co.*, 107 S.Ct. 2617, 2620 (1987) ("Because [42 U.S.C.] § 1981 . . . does not contain a statute of limitations, federal courts should select the most appropriate or analogous state statute of limitations").

Nothing in *Malley-Duff* casts doubt on the correctness of the Third Circuit's holding that § 510 of ERISA does not fit the exceptional circumstances that would warrant the borrowing of a statute of limitations from a different federal statute.⁸ Congress expressly provided a statute of

⁸ The similarities petitioner purports to find between *Malley-Duff* and the instant case (Supp. Br. 4-7) are non-existent:

(1) Unlike *Malley-Duff*, where "the clear legislative intent [was] to pattern RICO's civil enforcement provision on the Clayton Act" (107 S.Ct. at 2765), there is no evidence that Congress intended to pattern ERISA § 510's enforcement processes on the NLRA. Congress selected for ERISA § 510 an entirely different procedure from that applicable to NLRA violations—a private lawsuit rather than an administrative proceeding prosecuted by a government agent—and, indeed, rejected a proposed amendment that would have created an administrative enforcement scheme (Br. Op. 18).

(2) *Malley-Duff* stressed the need for uniformity of time limits in civil RICO actions because RICO "encompass[es] numerous and diverse topics and subtopics" and "[u]nder these circumstances . . . a uniform statute of limitations is required to avoid intolerable 'uncertainty and time-consuming litigation'." 107 S.Ct. at 2763-64, quoting *Wilson v. Garcia*, 471 U.S. 261, 273, 272 (1985). In contrast, § 510 of ERISA encompasses only a single narrowly-defined cause of action.

(3) The Court rejected borrowing a "catch-all" statute of limitations in *Malley-Duff* in part because it had already determined that there needed to be a uniform characterization usable in all states

limitations for *certain* ERISA causes of action, § 413, 29 U.S.C. § 1113, but was silent as to the time limit for § 510 actions. Petitioner does not urge borrowing the ERISA § 413 time limit, as the instant suit would be timely under that provision. And it is surely improbable that Congress, having designated a time limit for some ERISA actions but not others, intended its silence as to the latter to signify that the time limit of a wholly unrelated federal statute should be borrowed.⁹

B. Petitioner's alternative quest—that the Court grant certiorari to decide whether a two-year rather than six-year Pennsylvania statute of limitations should have been borrowed for this case—is not supported by this Court's decision in *Goodman v. Lukens Steel, supra*. The factors that impelled this Court to approve borrowing of a "personal injury" time limit in *Goodman* are wholly absent here. In *Goodman*, the plaintiffs had argued that 42 U.S.C. § 1981 was principally an "interference with contractual rights" statute, and thus that the state time limit applicable to actions seeking to vindicate such rights should control, but this Court agreed with the Third Circuit that that was an inaccurate characterization of § 1981:

[Plaintiffs'] submission is that § 1981 deals primarily with economic rights, more specifically the execu-

and many states do not have a catch-all statute, 107 S.Ct. at 2765. That concern is inapplicable to § 510 of ERISA, as the need for uniformity does not exist.

⁹ Nor is there reason to remand this case to the Third Circuit for reconsideration in light of *Malley-Duff*. The Third Circuit had the benefit of this Court's decision in *Del Costello* when it decided this case, but concluded, for reasons it detailed in its opinion (Pet. App. 23a-30a), that the factors prompting borrowing of a federal time limit in *Del Costello* were not applicable in the instant case. There can be no reason to think that *Malley-Duff* would alter the Third Circuit's decision: as the Third Circuit found *Del Costello* inapplicable—a labor case that borrowed the very time limit (§ 10(b) of the NLRA) that petitioner urges be borrowed in this case—it is inconceivable that *Malley-Duff*, which involved wholly unrelated statutes, would alter that court's view.

tion and enforcement of contracts, and that the appropriate limitations period to borrow is the one applicable to suits for interference with contractual rights, which in Pennsylvania was six years.

The Court of Appeals properly rejected this submission. Section 1981 has a much broader focus than contractual rights. The section speaks not only of personal rights to contract, but personal rights to sue, to testify, and to equal rights under all laws for the security of persons and property; and all persons are to be subject to like punishments, taxes and burdens of every kind. [107 S.Ct. at 2621.]

Given the need for a uniform limitations period applicable to all of the diverse subjects encompassed by § 1981 (*id.*), the Court found inapposite a time limit that would have been appropriate for only one of those subjects.

By contrast, the instant case involves a statute that applies *solely* to discrimination for the purpose of defeating employees' contractual pension rights; § 510 of ERISA is what the plaintiffs in *Goodman* unsuccessfully asserted § 1981 to be. Thus, the characterization that *Goodman* deemed inapposite to § 1981 is apt for ERISA § 510. And that is precisely the basis upon which the Third Circuit distinguished this case from its own decision in *Goodman* (Pet. App. 20a-21a, nn.20, 21).¹⁰

In sum, this Court's decision in *Goodman* does not alter the character of the limitations issue, for the instant case is distinguishable from *Goodman* in the ways already identified by the court below in its opinion.¹¹ And there

¹⁰ This Court's opinion in *Goodman* approved and adopted the rationale stated in the Third Circuit's *Goodman* opinion, 107 S.Ct. at 2621, and the Third Circuit in the instant case declared its *Goodman* holding and rationale inapplicable to this case because § 510 of ERISA, unlike 42 U.S.C. § 1981, is not a multi-issue statute. In light of this, there can be no warrant for remanding this case for reconsideration in light of *Goodman*: the court below has *already* considered and declared inapposite the holding and rationale of *Goodman*.

¹¹ Petitioner seeks support from this Court's observation in *Goodman* that "racially discriminatory interference" with the vari-

is nothing about the distinction drawn by the court below that is remarkable or warrants this Court's attention.¹²

Respectfully submitted,

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ous rights enumerated in § 1981 constitutes "a fundamental injury to the individual rights of a person," (107 S.Ct. at 2621). Even if this could be read as expressing a view that statutes applying solely to racially-motivated interference with contractual rights should be governed by personal injury rather than contractual time limits—and we do not think that reading is warranted—it would have no application here. Discrimination based on race is an insult to the person and thus in some sense inevitably constitutes a personal injury. By contrast, the only discrimination prohibited by § 510 is discrimination for the purpose of defeating contractual pension rights, a vice that closely resembles interference with contractual rights and that does not turn on personal attributes of the victim at all.

¹² Because neither of petitioner's theories for securing a shorter time limit is worthy of the Court's attention, it is perhaps superfluous to note that, even were there substance to petitioner's contention that recent decisions of this Court dictate a shorter time limit for § 510 of ERISA, and even if that shorter time limit could be applied retroactively to this case, such a holding would not avail petitioner because its concealment of its liability avoidance plan until after suit was filed (Pet. App. 16a), and its non-disclosure to employees that they had been permanently laid off (*id.* 13a), would have tolled any shorter time limit. *See*, Br. Op. 20 n.8.

In the Supreme Court of the United States

SPANIOL, JR.
CLERK

OCTOBER TERM, 1987

CONTINENTAL CAN COMPANY, PETITIONER

v.

ROBERT GAVALIK, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE

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Solicitor General

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Deputy Solicitor General

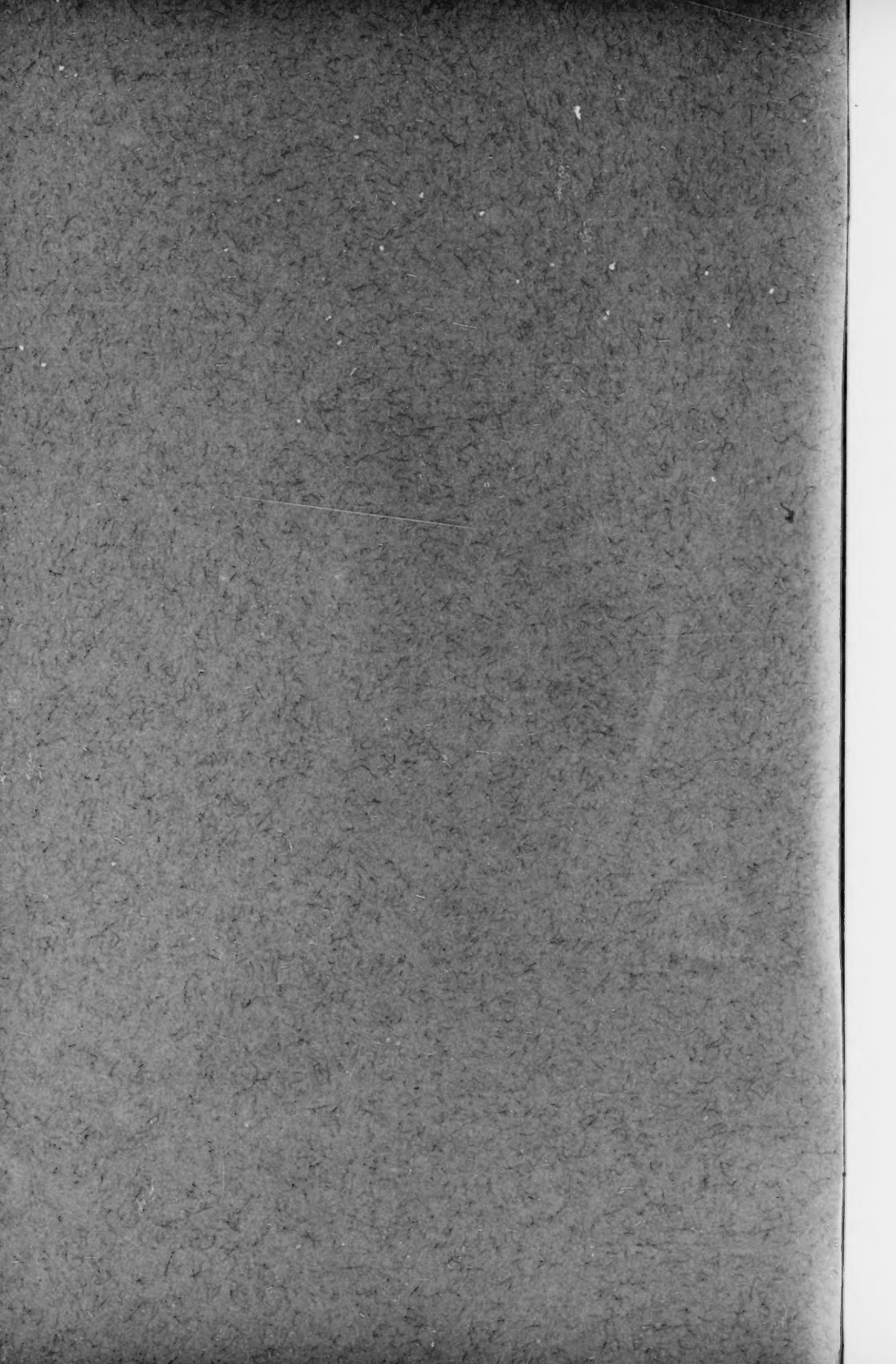
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QUESTIONS PRESENTED

1. Whether participants in an employee benefit plan may bring suit alleging that they were laid off so that they would not qualify for pension benefits, in accordance with their employer's "liability avoidance program" and contrary to Section 510 of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1140, without first exhausting the plan's grievance and arbitration procedures.

2. Whether the timeliness of a Section 510 claim is appropriately governed by a state six-year limitations period applicable to employment discrimination claims.

3. Whether, in a Section 510 class action, the employer properly bears the burden of proving, at the remedial stage, that members of the class would have been permanently laid off even if the employer had not devised an unlawful program to interfere with their attainment of pension eligibility.

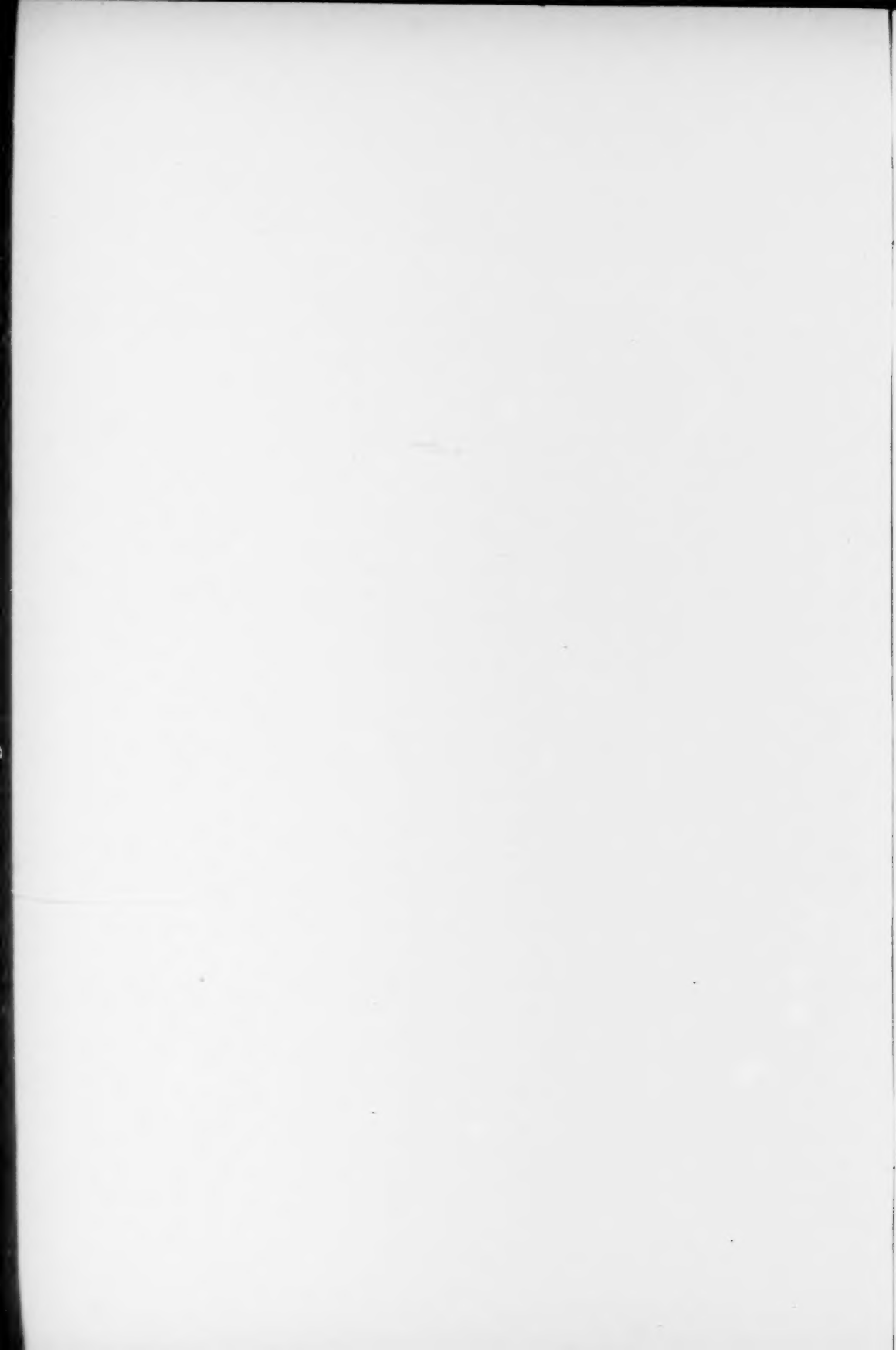


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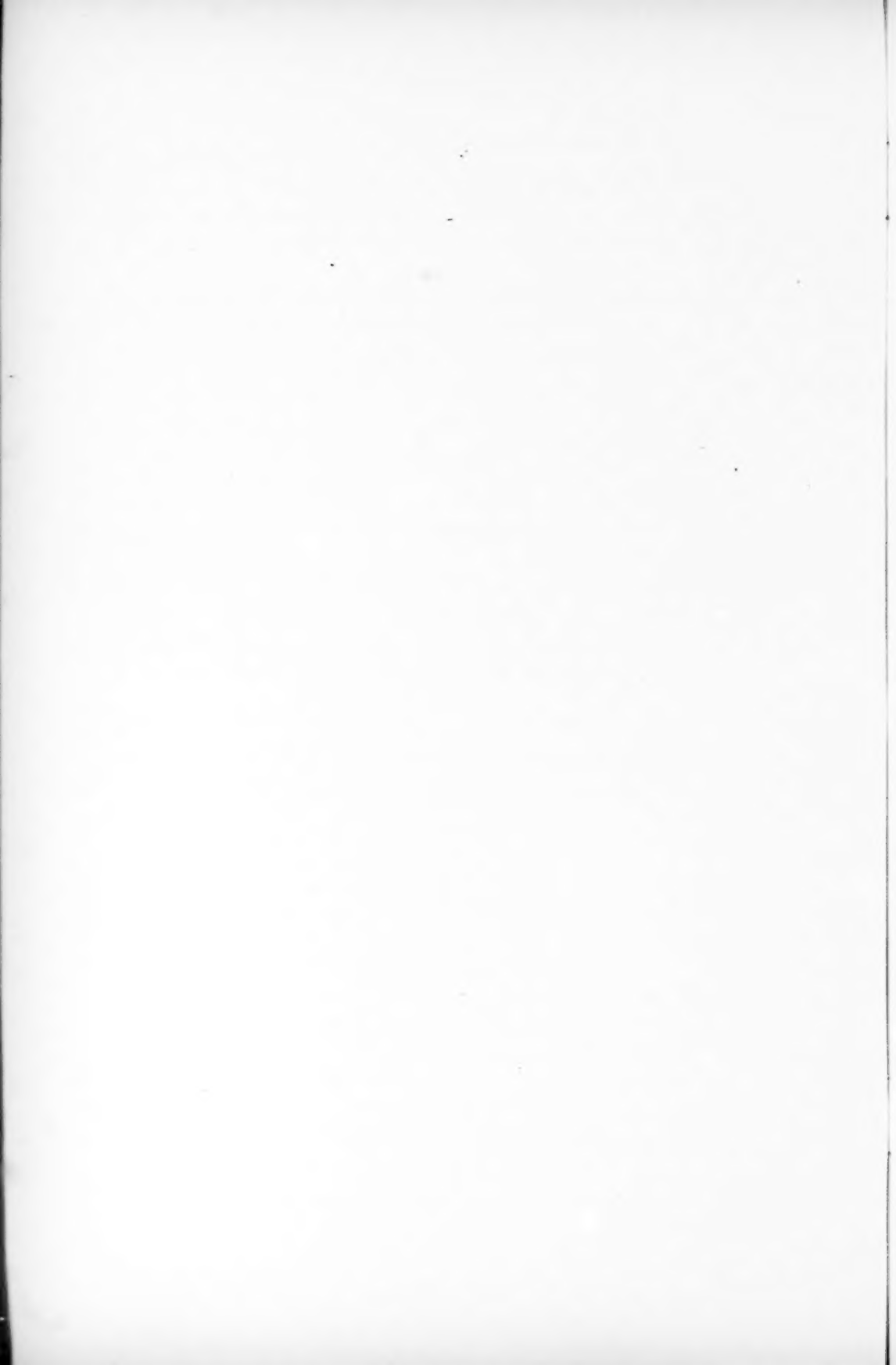
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In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 86-1659

CONTINENTAL CAN COMPANY, PETITIONER

v.

ROBERT GAVALIK, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT*

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

1. Petitioner, Continental Can Company, is a multistate employer that has established, through collective bargaining, a comprehensive pension plan for employees represented by the United Steelworkers of America. The "normal" pension plan provides that participants may retire and receive a pension at age 62. Pet. App. 69a. Break-in-service pensions are provided, in the event of a plant closing or involuntary layoff of two years or more, to employees who meet specified age and years of service requirements but do not qualify for normal pensions.¹ Under Section 510 of the Employee Retirement

¹ The plan provides that laid-off employees qualify for break-in-service pensions if: they have completed 20 years of service and their

Income Security Act of 1974 (ERISA), 29 U.S.C. 1140, it is unlawful "for any person to discharge * * * or discriminate against a participant * * * for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan."

In 1976, in a period of declining business, Continental Can developed what it termed a "liability avoidance" program (Pet. App. 11a, 80a), which was an intricate scheme to reduce its workforce in a manner that would minimize the number of its employees qualifying for break-in-service pensions. The program's objective was "to identify Continental's unfunded pension liabilities so as to avoid triggering future vesting by placing employees who had not yet become eligible for break-in-service on layoff, and to retain those employees whose benefits had already vested" (*id.* at 12a). Under the program, Continental Can identified which of its plants had the greatest potential pension liabilities and which of its employees lacked the age and service requirements to qualify for break-in-service pensions (*id.* at 12a, 40a-41a, 77a). It then "capped" employment at various plants, limiting the size of their workforces so that many employees not yet vested for break-in-service pensions were permanently laid off. The employees, however, were not told that their layoffs were considered permanent (*id.* at 13a, 78a). To assure that these laid-off, nonvested employees could not vest as a result of a recall, Continental Can developed a "red flag" system to alert top-level management whenever an employee designated as permanently laid off received a pay check (*id.* at 13a, 41a, 80a). Continental Can also deviated from its previous practice of adjusting staffing to

combined age and years of service equals 65 or more; or they are at least 50 years old with 15 years of service and their combined age and years of service equals 70 or more; or they have 15 years of service and their combined age and years of service equals 75 or more (Pet. App. 69a-70a).

meet the anticipated volume of business, instead tailoring the volume of business to fit the plant's cap. Where work could not be completed at a capped plant by working vested employees overtime, it was shifted to other plants. *Id.* at 12a n.13, 13a, 78a-79a.

Continental Can implemented its liability avoidance program at its plant in Pittsburgh, Pennsylvania, capping the plant in 1976 and subsequent years, and permanently laying off numerous employees (Pet. App. 14a-15a, 41a-43a, 89a). Continental Can closed the plant in 1981 (see *id.* at 48a n.40). Respondents are all former employees and participants in petitioner's pension plan, who, without having met the break-in-service pension eligibility requirements, were permanently laid off from the Pittsburgh plant between January 1976 and May 1978. Many of them were very close to qualifying for break-in-service pensions when laid off. *Id.* at 15a & n.17, 90a. In 1981, several respondents sued Continental Can, alleging that it had violated Section 510. After discovery uncovered the liability avoidance program, other respondents filed a separate action, later certified as a class action and consolidated with the first one, specifically challenging that program and its implementation in Pittsburgh. Pet. App. 16a.²

2. The district court denied Continental Can's motions to dismiss for failure to exhaust the grievance procedure

² Petitioner's liability avoidance program has also been challenged in California and Alabama. See *Amaro v. Continental Can Co.*, 724 F.2d 747 (9th Cir. 1984) (remanded for liability determination); *Mason v. Continental Group, Inc.*, 763 F.2d 1219 (11th Cir. 1985), cert. denied, 474 U.S. 1087 (1986) (dismissed for employees' failure to exhaust pension plan remedies). A district court in New Jersey, relying on the instant case, has recently held, in a nationwide class action (excluding the plaintiffs in this case, *Amaro*, and *Mason*), that Continental Can's liability avoidance program violates ERISA. *McLendon v. Continental Group, Inc.*, 660 F. Supp. 1553 (D.N.J. 1987).

set forth in the pension agreement.³ The pension plan provides for the resolution of disputes "as to whether or not such Employee is entitled to or as to the amount of" a pension (Pet. App. 126a). The court first held that respondents' claims are not covered by the plan's grievance procedure since respondents are "neither applicants for a pension nor in dispute with [Continental Can] as to whether or not they are entitled to a pension," explaining that their claim "is not that they have been denied their pensions, but that they have been denied the opportunity to eventually become entitled to a pension." Br. in Opp. App. 13a. The court also concluded that Section 510 "confer[s] * * * a statutory right independent of the collective bargaining agreement" that established the pension agreement, and held that such an independent statutory right may be enforced in court whether or not an employee had filed a grievance. Br. in Opp. App. 13a-14a.

The district court also rejected Continental Can's contention, made in a subsequent motion to dismiss, that in the absence of an express limitations period governing Section 510 claims, it should borrow either the six-month statute of limitations of Section 10(b) of the National Labor Relations Act, 29 U.S.C. 160(b), or the two-year state limitations period applicable to actions for intentional interference with contractual relations. In the court's view, respondents' Section 510 claims are most analogous to "an action charging employment discrimination or a suit alleging breach of a fiduciary duty, both of which are subject to the 6-year residuary period of limitations set forth in 42 Pa.C.S.A. § 5527(6)." Br. in

³ The pension agreement provides for the filing of grievances in accordance with the provisions of the collective bargaining agreement (Pet. App. 120a). That agreement, in turn, provides that the union can call for a meeting with a Continental Can employee (*id.* at 109a-110a). The union may then invoke arbitration procedures if not satisfied with the company's resolution of the dispute (*id.* at 110a).

Opp. App. 18a-19a. It accordingly borrowed that six-year statute of limitations.

Following trial on the issue of liability under Section 510, the district court found that a "motivating factor" in the cap and layoff decisions was to prevent respondents from becoming eligible for break-in-service pensions, but ruled, nevertheless, that Continental Can had not violated Section 510. Pet. App. 90a-91a. In the court's view, respondents were required to "prove not only that their impending pension eligibility made a difference in Continental's decisions that resulted in their layoffs, but also that those decisions and, consequently, their layoffs would not have occurred for any other reason" (*id.* at 53a (footnote omitted); see *id.* at 61a-64a). Under this view, the court concluded that respondents had not met their burden of proof on liability and accordingly entered judgment for Continental Can without reaching the question of damages to individual class members.

3. Relying on its prior decision in *Zipf v. AT&T*, 799 F.2d 889 (1986), the court of appeals affirmed the district court's conclusion that employees asserting Section 510 claims need not exhaust plan remedies before seeking relief in federal court (Pet. App. 30a-33a). The court of appeals also affirmed the district court's application of the six-year limitations period borrowed from state law, agreeing with the district court that a Section 510 action is most analogous to an employment discrimination action (*id.* at 17a-18a, 23a).

The court of appeals reversed the district court's conclusion that petitioner had not violated Section 510 of ERISA. Relying on the district court's factual findings that Continental Can established its "liability avoidance program" with the specific intention of interfering with the class members' pension eligibility, the court held that respondents had carried their burden of proving a pattern

or practice of discrimination sufficient to justify injunctive relief, if necessary. Pet. App. 37a, 43a n.36, 47a-48a. Indeed, the court concluded, the liability avoidance program, whose “sole purpose” (*id.* at 47a n.39 (emphasis in original)) was to prevent employees from attaining pension eligibility, was so “infested with discriminatory intent” that the court was “hard pressed” to imagine that anything would violate Section 510 if it did not (Pet. App. 45a). In the court’s view, the district court incorrectly required respondents to prove in the liability phase that, despite petitioner’s discriminatory motivation, they would not have lost work for any other reason (*id.* at 61a, 64a). It held that Continental Can could limit its damages to members of the class by proving in the remedial stage that they would have lost work without qualifying for a pension in the absence of the liability avoidance program, and it remanded the case to the district court to provide petitioner that opportunity (*id.* at 65a-66a).

ARGUMENT

1. *Exhaustion.* The courts below correctly concluded that respondents are not barred from bringing their Section 510 claims because they failed to exhaust grievance and arbitration remedies. Although this issue may warrant review by this Court because there is an express conflict in the circuits, the Court should not grant this petition because this case does not present a clear opportunity to resolve the conflict.

a. Respondents allege a *statutory* violation. They contend that Continental Can violated Section 510 by laying them off so that they would not qualify under the plan for break-in-service pensions. Section 502(a)(3) of ERISA, 29 U.S.C. 1132(a)(3), provides that plan participants may bring suit to enforce the requirements of ERISA.⁴ The

⁴ Section 502(a)(3), 29 U.S.C. 1132(a)(3), provides that plan participants may bring suit “(A) to enjoin any act or practice which vio-

Third and Ninth Circuits have concluded that exhaustion is not normally required before a plaintiff brings suit under Section 502(a)(3) alleging a violation of Section 510. Pet. App. 30a-33a; *Zipf v. AT&T*, 799 F.2d 889 (3d Cir. 1986), *reprinted in* Br. in Opp. App. 1a-11a; *Amaro v. Continental Can Co.*, 724 F.2d 747 (9th Cir. 1984). We agree with that conclusion.

As the court in *Zipf* explained (Br. in Opp. App. 5a), it is important to distinguish between actions brought "to enforce the terms of a plan" and actions brought "to assert rights granted by the federal statute." Congress established a scheme for internal plan review of benefit claims.⁵ Section 502(a)(1), 29 U.S.C. 1132(a)(1), provides that plan participants may bring suit alleging that they are entitled to benefits under the terms of a plan,⁶ and Section 502(a)(3), 29 U.S.C. 1132(a)(3), also authorizes suits to enforce the terms of the plan. See n.4, *supra*. Exhaustion

lates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan."

⁵ Section 503, 29 U.S.C. 1133, mandates that plans establish procedures under which participants may challenge benefit claim decisions. ERISA's legislative history shows that Congress modeled ERISA's benefit claim provisions on Section 301 of the Labor-Management Relations Act, 29 U.S.C. 185. See H.R. Conf. Rep. 93-1280, 93d Cong., 2d Sess. 327 (1974). Under Section 301, employees asserting claims under a collective bargaining agreement generally must exhaust available arbitral remedies and the arbitral decision is accorded deference. See, e.g., *DelCostello v. Int'l Brotherhood of Teamsters*, 462 U.S. 151, 163-164 (1983).

⁶ Section 502(a)(1)(B), 29 U.S.C. 1132(a)(1)(B), provides that a plan participant may bring suit "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan."

of the remedies available under a plan normally is required prior to bringing a benefit claim suit.⁷ It is sensible and appropriate to require exhaustion in such cases, as the meaning of the terms of the plan are at issue and the conclusions of those charged by the plan with resolving disputes over benefit claims should be of assistance to courts reviewing benefit claims.

In contrast to benefit claims, Congress intended claims alleging violations of provisions of ERISA to be within the "exclusive jurisdiction" of federal courts. See H.R. Conf. Rep. 93-1280, 93d Cong., 2d Sess. 327 (1974); see also 119 Cong. Rec. 30044 (1973) (statement of Sen. Javits). Congress considered, but rejected, a proposal to establish an administrative tribunal to consider claims alleging violations of Section 510. See 119 Cong. Rec. 30374, 30400 (1973). There is, accordingly, no reason to think that Congress intended to require exhaustion of any other remedy before initiation of a Section 510 claim. Furthermore, as the court in *Zipf* explained (Br. in Opp. App. 8a): "Unlike a claim for benefits brought pursuant to a benefits plan, a Section 510 claim asserts a statutory right which plan fiduciaries have no expertise in interpreting. Accordingly, one of the primary justifications for an exhaustion requirement in other contexts, deference to administrative expertise, is simply absent. * * * Moreover, statutory interpretation is not only the obligation of the courts, it is a

⁷ Both the Third Circuit and the Ninth Circuit have held that exhaustion is a prerequisite to the filing of a benefit claim suit. *Wolf v. National Shopmen Pension Fund*, 728 F.2d 182, 185 (3d Cir. 1984); *Amato v. Bernard*, 618 F.2d 559, 568 (9th Cir. 1980). Like the Third Circuit in *Zipf* (Br. in Opp. App. 5a), the Ninth Circuit in *Amaro* (724 F.2d at 751) expressly distinguished its prior decision holding that exhaustion was required prior to bringing a benefit claim suit in concluding that exhaustion is not required before alleging a statutory violation.

matter within their peculiar expertise." There is, therefore, no good reason to require exhaustion as a prerequisite to the filing of a Section 510 claim.

The decisions in *Zipf* and *Amaro* are strongly supported by this Court's recent decision in *Atchison, T. & S.F. Ry. v. Buell*, No. 85-1140 (Mar. 24, 1987), that exhaustion of the remedies available under a collective bargaining agreement is not required prior to bringing suit under the Federal Employers' Liability Act, 45 U.S.C. 51 *et seq.* The Court based its decision on the conclusion that the policies favoring arbitration are not persuasive in cases involving the assertion of " 'rights arising out of a statute designed to provide minimum substantive guarantees to individual workers.' " *Buell*, slip op. 7-8 (quoting *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 737 (1981)).⁸ ERISA generally is directed at providing such "minimum standards" (29 U.S.C. 1001(a)), and Section 510 in particular has such a purpose.⁹ Accordingly, plaintiffs should not generally be required to file grievances before filing Section 510 claims.

⁸ See also *McDonald v. City of West Branch*, 466 U.S. 284 (1984) (civil rights action under 42 U.S.C. 1983); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974) (Title VII of the Civil Rights Act of 1964); *U.S. Bulk Carriers, Inc. v. Arguelles*, 400 U.S. 351 (1971) (Seaman's Wage Act); *McKinney v. Missouri-K. & T. R.R.*, 357 U.S. 265 (1958) (seniority rights under Universal Military Training and Service Act).

⁹ See 29 U.S.C. 1001(a); *Central States, S.E. & S.W. Areas Pension Fund v. Central Transp., Inc.*, 472 U.S. 559, 567-570 (1985) (ERISA was enacted to provide "minimum standards" to assure the "equitable character" of employee benefit plans and to promote the well-being and security of employees and their dependents); S. Rep. 93-127, 93d Cong., 1st Sess. 36 (1973) (in some plans "a worker's pension rights or the expectations of those rights were interfered with by the use of economic sanctions," and Section 510 was intended to "preclude this type of abuse" and to "completely secure the rights and expectations [under ERISA]").

Furthermore, as the courts below concluded (Br. in Opp. App. 13a; Pet. App. 29a), exhaustion is plainly not warranted here because there is no procedure to exhaust. The pension plan agreement authorizes the filing of benefit claims only; it provides for the filing of grievances "as to whether or not such Employee is entitled to or as to the amount of such * * * pension" (Pet. App. 126a). Respondents neither contend that they are entitled to pensions nor are engaged in a dispute over the amount of their pensions, since they admittedly do not qualify for pensions under the terms of the plan. Instead, they seek equitable relief for Continental Can's manipulation of their employment status, in violation of Section 510, which they assert caused them to be ineligible for benefits under the plan.¹⁰

Petitioner suggests (Pet. 9 n.5) that respondents' claims could be brought under the grievance procedure provided by the collective bargaining agreement independent of their rights under the pension plan. The courts below did not find it necessary to respond to that unmeritorious contention. Respondents' claim is not arbitrable under the collective bargaining agreement, which provides for the filing of grievances concerning "the interpretation or application of or compliance with this Agreement" (Pet. App. 105a). Cf. *Iowa Beef Packers, Inc. v. Thompson*, 405 U.S. 228,

¹⁰ Petitioner suggest (Reply Br. 2 n.2) that a pension plan remedy exists here for Section 510 violations based on a statement in the summary description of the plan informing participants of their right under Section 510 to be free from discrimination (Pet. App. 124a). There is no merit to that suggestion. The Department of Labor requires plans to include such a statement. 29 C.F.R. 2520.102-3(t)(2). The statement merely informs participants of their statutory rights, and does not itself create a separate and distinct remedy under the plan.

229-230 (1972).¹¹ Respondents do not allege non-compliance with the collective bargaining agreement, but instead allege a violation of Section 510.¹²

b. Both the Seventh and Eleventh Circuits, in conflict with the Third and Ninth Circuits, have concluded that exhaustion of plan remedies is required before a plaintiff

¹¹ The question presented in *Iowa Beef Packers* was whether exhaustion was required before bringing suit under the Fair Labor Standards Act to recover overtime compensation. The relevant collective bargaining agreement in that case, like the agreement here, applied "only to grievances 'pertaining to a violation of the Agreement' " (405 U.S. at 230). The Court contrasted that agreement with the agreement in *U.S. Bulk Carriers, Inc. v. Arguelles*, 400 U.S. 351 (1971), which provided for the "resolution of all disputes and grievances, not merely those based on alleged violations of the contract" (405 U.S. at 229). The Court dismissed the petition in *Iowa Beef Packers* as improvidently granted after learning at oral argument that the grievance procedure was limited to the resolution of alleged violations of the collective bargaining agreement (*id.* at 229-230).

¹² Petitioner contends (Supp. Br. 1-3) that this Court's recent decision in *Shearson/American Express Inc. v. McMahon*, No. 86-44 (June 8, 1987), supports its argument that respondents should be barred from pursuing their Section 510 claims. There is no merit to that contention. In *Shearson/American Express*, as in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), this Court upheld, under the Federal Arbitration Act, 9 U.S.C. 1 *et seq.*, agreements to arbitrate disputes. There was no agreement to arbitrate the dispute at issue since, as we have shown (pp. 10-11, *supra*), neither the pension plan nor the collective bargaining agreement provides for the consideration of respondents' claim. Moreover, the Court in *Shearson/American Express* recognized (slip op. 5) that the question there was whether Congress intended to authorize agreements to arbitrate particular statutory questions. Since Congress does not generally intend to bar employees from obtaining judicial review of claims arising under statutes providing minimum guarantees to individual workers (see p. 9 & n.8, *supra*), the analysis in *Shearson/American Express* leads to the conclusion that exhaustion is not required here.

may bring a Section 510 claim. *Dale v. Chicago Tribune Co.*, 797 F.2d 458, 465-467 (7th Cir. 1986), cert. denied, No. 86-933 (Jan. 27, 1987); *Kross v. Western Elec. Co.*, 701 F.2d 1238, 1243-1245 (7th Cir. 1983); *Mason v. Continental Group, Inc.*, 763 F.2d 1219, 1224-1227 (11th Cir. 1985), cert. denied, 474 U.S. 1087 (1986). The conflict is express. Br. in Opp. App. 4a-5a (*Zipf*); *Mason*, 763 F.2d at 1226-1227; *Amaro*, 724 F.2d at 751-752. Accordingly, it would seem that review by this Court is warranted since the issue is certain to arise again and is of considerable importance to the millions of employees covered by pension plans.¹³

Respondents argue (see Br. in Opp. 15-16) that review is not warranted because the decisions of the Seventh and Eleventh Circuits are so clearly wrong that those Circuits may reverse themselves. As respondents state, those courts did not appreciate the distinction between benefit claims and statutory claims.¹⁴ This Court's recent decision in *Atchison, T. & S.F. Ry. v. Buell* (see p. 9, *supra*) might provide an occasion for those Circuits to reconsider their

¹³ Two members of this Court dissented from the denial of the petition for a writ of certiorari in *Mason*. As petitioner states (Pet. 7), the conflict in the circuits has since expanded as a result of the Third Circuit's decisions here and in *Zipf*.

¹⁴ District courts and commentators have criticized the Seventh and Eleventh Circuits for failing to recognize the distinction between benefit claims and statutory claims. *Treadwell v. John Hancock Mutual Life Ins. Co.*, 666 F. Supp. 278, 284 (D. Mass. 1987); *Manser v. Missouri Farmers Ass'n*, 652 F. Supp. 267, 272 (W.D. Mo. 1986); *Allen v. American Home Foods, Inc.*, 644 F. Supp. 1553, 1563 n.10 (N.D. Ind. 1986); Note, *Civil Actions Under ERISA Section 502(a): When Should Courts Require That Claimants Exhaust Arbitral or Intrafund Remedies?*, 71 Cornell L. Rev. 952, 981 (1986); see also Utz & Martucci, *Unlawful Interference with Protected Rights Under ERISA*, 42 J. Mo. B. 177, 183-184 (1986).

decisions. However, the Ninth Circuit in *Amaro* (724 F.2d at 751) explained the difference between benefit claims and statutory claims in distinguishing its decision from its prior decision in *Amato v. Bernard*, 618 F.2d 559, 568 (9th Cir. 1980), and it also reviewed this Court's line of cases preceding *Atchison, T. & S.F. Ry. v. Buell* (see n.8, *supra*). Nevertheless, after the decision in *Amaro* was published the Seventh Circuit held in *Dale* that the rule in that Circuit is that district courts may require exhaustion and the Eleventh Circuit concluded in *Mason* that exhaustion is required prior to the initiation of a Section 510 claim, expressly rejecting (763 F.2d at 1226-1227) the holding in *Amaro*. It is therefore less than clear that the Seventh and Eleventh Circuits will correct their prior decisions.

Although the Court will most likely have to consider at some time whether exhaustion is required before suit is filed under Section 510, that issue would probably not be resolved were the Court to hear this case. The courts below based their conclusion that exhaustion was not required in part on the fact that there was no opportunity under the plan at issue to obtain relief by filing a grievance. That conclusion is plainly correct. Accordingly, if the Court grants the petition, it will most likely conclude that exhaustion was not warranted here because there was no procedure to exhaust, a rather unsurprising conclusion that would settle nothing of importance.¹⁵ As in *Iowa Beef Packers* (see n.11, *supra*), the Court might then dismiss

¹⁵ It is correct, as petitioner notes (Reply Br.1), that the Eleventh Circuit in *Mason* held that exhaustion was required in a case also involving Continental Can. The court appeared to be unaware, however, that relief was unavailable under the terms of the relevant agreements. Even if it is assumed that the court implicitly decided that there was some procedure to exhaust, it would not be sensible to grant the petition for a writ of certiorari here to resolve a conflict over the

the petition as improvidently granted. In our view, the Court should wait for a Section 510 case where there is an opportunity to obtain relief through the filing of a grievance, and then grant that case to determine whether exhaustion should be required.

2. *Statute of limitations.* There is no allegation that the decision to borrow Pennsylvania's six-year statute of limitations for employment discrimination claims conflicts with any decision of another court of appeals or the Pennsylvania Supreme Court. Contrary to petitioner, that decision is consistent with this Court's decisions. Therefore, there is no reason to review the statute of limitations issue.

No express limitations period is set forth to govern Section 510 claims.¹⁶ In such circumstances, a court's "task is to 'borrow' the most suitable statute or other rule of timeliness from some other source." *Agency Holding Corp. v. Malley-Duff & Assocs.*, No. 86-497 (June 22, 1987), slip op. 3 (quoting *DelCostello v. Int'l Brotherhood of Teamsters*, 462 U.S. 151, 158 (1983)). Congress generally may be presumed to have intended a state rather than federal period to apply, given its awareness of this Court's longstanding practice of borrowing state periods. *Agency Holding Corp.*, slip op. 4. A federal statute of limitations should be borrowed only when federal law "clearly provides a closer analogy than available state statutes," and

interpretation of Continental Can's pension and collective bargaining agreements. That is especially so since the *Mason* litigation has concluded, so that it is not possible to provide relief to the employees who brought that suit.

¹⁶ ERISA contains a statute of limitations that prescribes that suits alleging breaches of fiduciary duty generally must be brought within six years of the date of the breach. 29 U.S.C. 1113. However, that statute of limitations expressly applies only to actions alleging violations of 29 U.S.C. (& Supp. III) 1101-1114, which govern "fiduciary responsibility," and hence does not apply by its terms to Section 510 claims.

“ ‘the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial lawmaking’ ” (*ibid.* (quoting *DelCostello*, 462 U.S. at 172)).

The courts below followed the principles established by this Court. The courts characterized respondents' claim as an employment discrimination claim, which is entirely accurate. Looking to state law, the courts concluded that a six-year statute of limitations applies to such claims (Br. in Opp. App. 19a; Pet. App. 18a). That conclusion also appears to be correct. As noted in *Ulloa v. Philadelphia*, 95 F.R.D. 109, 114 & n.5 (E.D. Pa. 1982), the six-year statute of 42 Pa. Cons. Stat. Ann. § 5527 (Purdon 1981) applies to claims brought under Pennsylvania's Human Relations Act, Pa. Stat. Ann. tit. 43, § 951 (Purdon 1964), which proscribes various sorts of employment discrimination.¹⁷ Since in Pennsylvania a six-year statute governs employment discrimination claims, it is appropriate that such a period should govern Section 510 claims brought there, in the absence of compelling reasons to borrow another period from a federal statute.¹⁸

¹⁷ Petitioner appears to contest (Pet. 23-24) the choice of Section 5527 as the most analogous state statute of limitations. There is no apparent merit to their argument. In any event, as respondents state (Br. in Opp. 20), that is not a question warranting this Court's attention.

¹⁸ Petitioner suggests (Pet. 21-22) that, if a state statute of limitations governs Section 510 claims, Pennsylvania's two-year statute of limitations governing personal injury claims, 42 Pa. Cons. Stat. Ann. § 5524 (Purdon 1981), should be borrowed. There is no merit to that suggestion, as Section 510 claims are clearly more analogous to employment discrimination claims than to personal injury tort claims. Petitioner's argument is based primarily on this Court's conclusion in *Wilson v. Garcia*, 471 U.S. 261, 276 (1985), that claims brought under 42 U.S.C. 1983 must be brought within the time allowed by the applicable state statute of limitations governing "tort action[s] for the

Petitioner contends (Pet. 18-21), relying primarily on *DelCostello*, that the six-month statute of limitations of Section 10(b) of the National Labor Relations Act, 29 U.S.C. 160(b), ought to be borrowed and applied. However, the reasons that persuaded the Court in *DelCostello* to depart from the normal practice of borrowing a state statute of limitations are not present here. The claims in *DelCostello* were "hybrid § 301/fair representation claim[s]" in which employees alleged both breaches of collective bargaining agreements by their employers and breaches of their unions' duty of fair representation (462 U.S. 164-165). The Court found that such a claim "has no close analogy in ordinary state law" (*id.* at 165). Here, in contrast, respondents' claim is reasonably analogized to an employment discrimination claim in violation of Pennsylvania's Human Relations Act.

More importantly, the adoption of a six-month period would conflict with the policies underlying Section 510. Congress enacted Section 510 to "completely secure the rights and expectations" of plan participants (S. Rep. 93-127, 93d Cong., 1st Sess. 36 (1973)), and intended generally to remove "procedural obstacles" that had kept plan participants from asserting their rights (*id.* at 35). Congress evidently believed that allowing plan participants six years in which to bring suit would not impair defendants' ability to respond to claims or otherwise infringe upon their interests, since it enacted a basic six-year time limit for fiduciary breach actions. 29 U.S.C. 1113(a)(1).

recovery of damages for personal injuries." However, as the Court noted, Section 1983 was enacted in 1871 to prohibit "whippings and lynchings" by the Ku Klux Klan (471 U.S. at 276). Thus, "[t]he atrocities that concerned Congress in 1871 plainly sounded in tort" (*id.* at 277) and it was reasonable to analogize Section 1983 to a personal injury tort statute. Congress enacted Section 510 to prohibit employers from discriminating against employees on the basis of their pension status, and it is therefore properly considered to be an employment discrimination statute, not a personal injury tort statute.

Part of Congress's interest in establishing a relatively long limitations period was "to impress upon those vested with the control of pension funds the importance of the trust they hold." *Brock v. Nellis*, 809 F.2d 753, 754 (11th Cir. 1987). It seems unlikely that Congress intended to impress upon employers any lesser sense of the importance of pension rights, or to provide them any "eas[y] * * * refuge" from suit (*ibid.*).¹⁹ Accordingly, there are no compelling reasons to adopt the six-month statute of limitations of Section 10(b) of the National Labor Relations Act. Rather, there are compelling reasons to adopt a longer statute.

3. *Burdens of proof.* The court below was the first court of appeals to rule on the proper allocation of the burdens of proof in a Section 510 class action. Its ruling that Continental Can bears the burden of proving at the remedial stage that individual members of the class would have been laid off without qualifying for a pension in the absence of Continental Can's unlawful liability avoidance program is entirely in accord with this Court's rulings in parallel employment discrimination contexts. Review of this issue is therefore unwarranted.

There is no question that Section 510 prohibits precisely the kind of scheme that Continental Can devised here. Section 510 bars discrimination "for the purpose of interfering with the attainment of any right to which such par-

¹⁹ In addition, Congress specifically provided that the beginning of the six-year period against fiduciaries is tolled until the date a breach of duty or violation is discovered in cases of "fraud or concealment" (29 U.S.C. 1113(a)), thus demonstrating a willingness to extend indefinitely limitations periods against pension plan fiduciaries. Congress could hardly have intended that employers such as Continental Can should be protected from suit after six months when they adopt and implement secret liability avoidance programs that prevent employees from qualifying for pension benefits. The lower courts found it unnecessary to decide whether tolling is appropriate in this case. See *Br. in Opp.* 20 n.8; *Br. in Opp. App.* 19a n.1.

ticipant may become entitled," and the "sole purpose" (Pet. App. 47a) of Continental Can's liability avoidance program was to prevent employees from qualifying for break-in-service pensions. As the court of appeals explained (*id.* at 47a n.39), the purpose of Section 510 is to prevent employers from circumventing vesting requirements by discharging employees before they vest, whether motivated by malice toward particular employees or by concern for the economic condition of the company. See 119 Cong. Rec. 30387-30388 (1973) (remarks of various senators). Like the court of appeals (Pet. App. 45a), we would be "hard pressed" to imagine that anything would violate Section 510 if this does not.

Petitioner contends that the court of appeals erred by not permitting it to prove at the class liability stage that it would have taken the same actions even absent its unlawful discriminatory motivation. This assertion is meritless. This Court requires that in employment discrimination class actions the class representatives must prove a pattern or practice, rather than just isolated instances, of discrimination; the discriminatory practice must be the employer's "standard operating procedure." *Cooper v. Federal Reserve Bank*, 467 U.S. 867, 876 (1984); *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 361-362 (1977). Respondents met that burden by proving the existence of petitioner's liability avoidance program and its implementation at Pittsburgh (Pet. App. 43a & n.36, 47a). They would have been entitled to classwide, prospective injunctive relief had the Pittsburgh plant not closed (*id.* at 47a, 48a n.40). They are also entitled to an inference that individual employment decisions taken while the policy of discrimination was in effect were taken in pursuit of that policy. *Teamsters*, 431 U.S. at 361-362; *Franks v. Bowman Transp. Co.*, 424 U.S.

747, 772 (1976); Pet. App. 47a, 55a, 61a; see *Cooper*, 467 U.S. at 876.²⁰

Nothing in *Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977), which was not a class action, is to the contrary. The Court there held that, once the plaintiff had established that a constitutionally protected action was a motivating factor in the decision not to rehire him, the burden was on the *employer* to show "by a preponderance of the evidence that it would have reached the same decision as to [the plaintiff's] reemployment even in the absence of the protected conduct" (*id.* at 287). That is what the court of appeals ordered here. Under its order, Continental Can will have the opportunity on remand to prove that respondents are not entitled to compensatory relief. It has so far suffered no monetary liability and, if it meets its burden for all class members, will have none.²¹ Thus, contrary to petitioner (Pet. 24-30), the decision in *Mount Healthy* supports the court of appeals' decision.

²⁰ In a case involving one instance of discrimination, where the plaintiff has established a *prima facie* case and the employer has presented evidence in rebuttal, the burden of persuasion that the employer intentionally discriminated against the plaintiff is on the plaintiff. See, e.g., *Cooper*, 467 U.S. at 875. Here, in a pattern and practice class action, respondents have established that Continental Can violated Section 510 by implementing policies to minimize the company's pension liability. The remaining question of the appropriate relief, if any, due individual members of the class is separate from the issue of whether there has been a statutory violation. The court of appeals properly placed the burden on Continental Can to show that individuals would have been laid off without qualifying for break-in-service pensions even absent the violation of Section 510.

²¹ The court of appeals specifically noted that Continental Can may present proof, if appropriate "collectively as to all of the plaintiffs" (Pet. App. 65a), that respondents would have been laid off without qualifying for break-in-service pensions in the absence of its liability avoidance program.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

CONTINENTAL CAN COMPANY,

Petitioner,

v.

ROBERT GAVALIK, *et al.*,

Respondents,

-and-

CONTINENTAL CAN COMPANY, a
member of THE CONTINENTAL GROUP, INC.,

Petitioner,

v.

ALBERT JAKUB, *et al.*, on behalf of themselves and
others similarly situated,

Respondents.

**SUPPLEMENTAL BRIEF IN RESPONSE TO
AMICUS CURIAE BRIEF OF THE UNITED STATES**

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ARGUMENT

I. Exhaustion of Grievance-Arbitration Remedies.

The Solicitor General admits that there is a clear "express" conflict among the circuits, that the exhaustion issue is "certain to arise again" and is "of considerable importance to the millions of employees covered by pension plans" (See Br. at 12) and that the Court "will most likely have to consider at some time whether exhaustion is required before suit is filed under Section 510" (Br. at 13).

The Solicitor General's opposition on the exhaustion issue is entirely premised on the argument that this Court could not decide the arbitrability issue and relies exclusively on *Iowa Beef Packers, Inc. v. Thompson*, 405 U.S. 228 (1972). Such reliance is misplaced. Unlike that case, the arbitrability issue here has been squarely presented to the Court and this pension-related dispute is covered by the terms of the applicable Pension and Master Agreements.

In *Iowa Beef Packers*, the Court concluded that the issues presented by petitioner "provide no occasion to address" the exhaustion question. 405 U.S. at 230 (1972). The Court therefore dismissed the petition as improvidently granted. The exhaustion issue in the present case as stated by the petitioners is whether an employer is prevented "from enforcing a provision in a collective bargaining agreement to arbitrate *any pension-related differences*." (emphasis added, pet. at i). The issue is clearly presented and *Iowa Beef Packers* is inapposite.

Moreover, petitioners have also clearly called for review of the lower courts' decisions that the underlying dispute is non-arbitrable under the Pension Agreement and the Master Agreement. Petitioners noted that the decisions are in conflict with this Court's long-standing presumption in

favor of the arbitrability of labor disputes. Petition at 9, n.5.

The Solicitor General has confused *Iowa Beef Packers* with the first prong of the test for arbitrability enunciated in *Mitsubishi Motors v. Soler Chrysler-Plymouth*, 473 U.S. 614 (1985). In *Iowa Beef Packers*, the issue as presented was whether exhaustion was required of a non-arbitrable dispute. The Court could not reach the exhaustion question because there was no arbitration procedure available to exhaust. In *Mitsubishi Motors*:

[T]he first task of a court asked to compel arbitration of a dispute is to determine whether the parties agreed to arbitrate that dispute.

Id. at 626.

Petitioners have asked this Court to enforce provisions in its collectively-bargained Pension Agreement and in its collectively-bargained Master Agreement to arbitrate *any pension-related differences*. As in *Mitsubishi*, the Court will have to decide whether the parties agreed to arbitrate this dispute. Unlike *Iowa Beef Packers*, the petition here squarely presents the question of whether exhaustion is required and an arbitration procedure is available for that purpose.

Petitioners contend that the grievance dispute and the statutory dispute are one and the same, that the parties agreed to arbitrate and that the arbitrator is empowered to decide the dispute. See petitioners' reply brief at 2, n.2. The unambiguous meaning of the grievance/arbitration clauses requires exhaustion. See the petition at 105a for the definition of a grievance in the Master Agreement. From the Pension Agreement at pet. 120a:

Any differences that may arise between you and the company concerning . . . your entitlement to . . . (a) pension . . . may be taken up as a griev-

ance in accordance with the applicable provisions of the Master Agreement. (emphasis added.)

Compare and contrast this "any differences" language and the terms cited by the Solicitor General at 10, 11, and n.11.

The Solicitor General admits at 13, n.15, that the Eleventh Circuit decided that exhaustion was required in a nearly identical case in which employees sued both the petitioners and the United Steelworkers Union. *Mason v. Continental Group, Inc.*, 569 F. Supp. 1241, *aff'd*, 763 F.2d 1219 (11th Cir. 1985), *cert. denied*, 474 U.S. 1087 (1986). The dispute was held arbitrable under the terms of the same arbitration provisions at issue here. This Court denied certiorari.

The Solicitor General then makes the following unfounded, unwarranted and erroneous statement. "The court appeared to be unaware, however, that relief was unavailable under the terms of the relevant agreements." (Br. at 13, n.15). What does the Solicitor General think the district court, the Eleventh Circuit and this Court decided in *Mason* when the issue of exhaustion was considered in the context of these same agreements?

The Solicitor General's following statement exemplifies the prejudicial view expressed in his brief.

Even if it is assumed that the court implicitly decided that there was some procedure to exhaust, it would not be sensible to grant the petition for a writ of certiorari here to resolve a conflict over the interpretation of Continental Can's pension and collective bargaining agreements. That is especially so since the *Mason* litigation has concluded, so that it is not possible to provide relief to the employees who brought that suit.

Id.

It is still possible to provide relief to the petitioners in a manner which would resolve the conflict among the Circuits and with *Mason*, namely, require exhaustion.

If the arbitration provision is ambiguous, the issue needs to be briefed and argued. The intent of the arbitration provisions, the past practice of the parties and the practice and interpretation throughout the industry support exhaustion.

Further, the Solicitor General, erred by relying on *Zipf v. American Tel. & Tel.*, 799 F.2d 889 (3d Cir. 1986), and by failing to distinguish between exhausting plan procedures in a non-collectively bargained plan and failing to exhaust the arbitration provisions in a collectively bargained Pension Agreement.

Monica Zipf was a managerial employee. Appellant's Brief at 5, Appellee's Brief at 6 in *Zipf, supra*, No. 85-3420. There is no mention in the *Zipf* decision of a union or of a collective bargaining agreement. The policy reasons behind the distinction between a non-union plan and a collectively bargained Pension Agreement are important. As Senator Hartke stated in Senate debate:

The procedures with respect to union employees would be handled by arbitration.

Legislative History of ERISA of 1974; Vol. 2, at 1837; 119 Cong. Rec. 30,401 (1973).

The extraordinary layoff pension benefits at issue here were created in collective bargaining, not under ERISA, and as such are part and parcel of the collective bargaining process. If this decision on arbitrability stands, the anomalous result will ensue that the union created rights in collective bargaining yet created no corresponding method to enforce those rights. Implicitly, the union would have breached its duty of fair representation.

The Solicitor General is clearly and simply wrong on *Iowa Beef Packers*. The arbitrability issue is before the

Court. The Solicitor General could not have answered the first prong of the test for arbitrability enunciated in *Mitsubishi* because the issue has not yet been briefed.

The Solicitor General also chose to ignore this Court's reliance on H.R. Conf. Rep. No. 93-1280, p.327 (1974) from ERISA's Legislative History. ERISA civil actions are to be regarded as arising "in similar fashion to those brought under § 301 of the Labor Management Relations Act of 1947." *Metropolitan Life v. Taylor*, 107 S.Ct. 1542 (1987). Section 301 is of course this Court's authority for its longstanding presumption in favor of arbitrability in labor cases. Exhaustion is required.

II. The Statute of Limitations.

The Solicitor General utterly failed to address two important legal principles:

A.) This Court has repeatedly taught that ERISA should be uniformly applied. *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981), *Pilot Life v. Dedeaux*, 107 S.Ct. 1549 (1987), *Metropolitan Life v. Taylor*, and *Fort Halifax Packaging Co. v. Coyne*, 107 S.Ct. 2211 (1987).

B.) ERISA preempts state laws. 29 U.S.C. § 1144(a).

The Solicitor General ignored the various state periods of limitations ranging from two to six years applied by lower courts to date. See petition at 17, n. 11. The Solicitor General ignored this Court's teaching in *Agency Holding Co. v. Malley-Duff and Assocs.*, 107 S.Ct. 2759 (1987), and *Goodman v. Lukens Steel Co.*, 107 S.Ct. 2617 (1987), which respectively opted for a uniform federal limitations period and rejected the same Pennsylvania state catch-all period at issue here. The federal policies at stake require a uniform federal statute of limitations.

At 14, the Solicitor General asserts: "Congress generally may be presumed to have intended a state rather than federal period to apply, given its awareness of this Court's longstanding practice of borrowing state periods." This

argument is refuted by Congress' preemption of state pension laws. 29 U.S.C. § 1144(a). It is simply illogical to suggest that this Court should presume that Congress intended a state limitations period to apply when Congress expressly preempted state laws.

The Legislative History reveals that the Solicitor General's presumption is unwarranted. The first Senate ERISA bill, S.4, did not contain language comparable to § 510 of ERISA which was added by the Senate Committee on Labor and Public Welfare. Yet, no new provisions were added as to a period of limitations. Sections referred to by Senator Hartke as 602, 603 and 610 later became sections 502, 503 and 510:

Section 610 was added after 602 and 603 were drafted, and (the bill) was not redrafted to cover 610.

Legislative History of ERISA of 1974; Vol. 2, at 1735; 119 Cong. Rec. 30,374 (1973).

III. The Mt. Healthy "Same Decision" Test Of Causation.

The Solicitor General mischaracterizes the third issue. Contrast the issue presented in the petition at i and in the Solicitor General's brief at I.

The Solicitor General's four paragraph discussion at 17 fails to grasp that this Court's test in *Mt. Healthy City School Dist. Bd. of Ed. v. Doyle*, 429 U.S. 274 (1977), is a test of causation which goes to liability not simply to the burdens of proof. § 510 proscribes discrimination with the intent to deprive employees of pension benefits. If the acts alleged were caused by a legitimate motive, then there is no liability. The trial judge expressly found such legitimate business motives. (Findings of Fact 107 and 142, Pet. at 86a and 90a). Thus, this is a mixed-motive employment discrimination case similar to *Mt. Healthy* and

NLRB v. Transportation Management Corp., 462 U.S. 393 (1983).

The Solicitor General erroneously titled the issue "Burdens of Proof" at 17. It is undisputed that the burdens of production and proof as to "same decision" evidence are on the employer.

In the second paragraph, the Solicitor General discusses the undisputed purpose of § 510 and the "sole purpose" language from *Gavalik*, pet. at 47, n.39, which conflicts with the trial judge's findings of fact as to petitioners' legitimate business motives.

In the third paragraph, the Solicitor General baldly declares as "meritless" petitioners' contention that "same decision" evidence is properly presented in the liability stage of the case.¹ The Solicitor General then discusses the standard burdens of proof in discrimination cases which again are not in dispute.

The Solicitor General asserts that: "Nothing in *Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977), . . . , is to the contrary." However, the employers in *Mt. Healthy* and in *Transportation Mgt.* were permitted to defeat liability by presenting "same decision" evidence.

This distinction between defeating liability in the first stage and defeating only damages in the remedial phase is not grasped by the Solicitor General. See Br. at 19, n.20. According to the Solicitor General, if the petitioner meets its burden, no monetary liability will ensue. Even this could be untrue if respondents obtained an award of attorneys' fees based on the liability finding. More importantly, it ignores the onus attached to a finding of liability and the effects therefrom. For example, in *McLendon v.*

¹ This is contrary to *East Texas Motor Freight System v. Rodriguez*, 431 U.S. 395, 404 n.9 (1977).

Continental Group, Inc., 660 F. Supp. 1553 (D. N.J. 1987), petitioners have been collaterally estopped from defending as to liability based on this decision in *Gavalik*.

The Solicitor General also failed to address the standard of appellate review and the policy implications which arise therefrom. As stated in the petition: "The Panel's de novo review of the record and its opinion concerning issues not decided below was violative of the appropriate standards of appellate review." Pet. at 30.

The Third Circuit's opinion mischaracterized the district court's findings of fact. (Pet. 67a). The pension benefits at issue were negotiated by the union and petitioner (FF 78 - 79, pet. 81a) at a time when the can business was in a significant decline. (FF 31, pet. 73a). Senior and older employees were protected from plant shutdowns and involuntary layoffs (FF 14, pet. 70a) by plantwide seniority and the provisions of an interplant job opportunities program. (FF 67, 71 - 76, pet. 79a - 81a).

Petitioners designed the Bell System to manage unfunded pension costs. (FF 53, pet. 77a). Indeed, petitioners set aside hundreds of millions of dollars to meet expected costs, including pensions, due to declining business. 231 million dollars was set aside. (FF 43, pet. 75a). This reserve was spent and an additional 100 million dollar reserved was set aside. (FF 44 - 45, pet 76a). Petitioners' conduct in this regard is an example of corporate responsibility. Conversely, corporate failure to manage unfunded pension costs leads to the bankruptcies filed by other companies in the metals industry which have burdened the Pension Benefit Guaranty Corporation with their pension obligations.

When petitioner "capped" a plant, the purpose of the cap was to identify the proper level of manning needed to meet the projected level of production. (FF 56, pet. 78a). The Third Circuit also mischaracterized findings of fact 61 and 63 (pet. 78a-79a) as showing that the goal of

the company was to adjust production to a predetermined level of manning whereas the trial judge's findings establish that the level of manning was based on the level of production required by market demand. (Pet. at 41a, FF 56, pet. 78a). Laid off employees were subject to recall if "business reasons justified the recall." (FF 56, pet. 78a). The Third Circuit incorrectly states that laid off employees were only to be recalled under "extreme" or "exigent" circumstances. (Pet. 12a, 41a).

The Third Circuit altered the meaning of the trial judge's findings of fact to hold that consideration of pension costs is a *per se* violation of ERISA. For example, it is very significant that in this mixed-motive discrimination case, the Third Circuit never mentioned the trial judge's findings that petitioner had legitimate business motives. (FF 107, 142, pet. 86a, 90a). Such findings were made after an extensive trial and were not clearly erroneous.

The Solicitor General has adopted these mischaracterizations in his brief. For two examples of these mischaracterizations, contrast the findings of the district court with the statements by the Third Circuit and the Solicitor General.

1.) The district court's findings of fact 55, pet. 78a; the Third Circuit's Opinion, pet. 12a; and the Solicitor General's brief at 2.

The district court's findings of fact 53, 59 and 68, pet. 77a, 78a, 80a; the Third Circuit's Opinion, pet. 47a, n.39; and the Solicitor General's brief at 18.

The Third Circuit "ignored the findings of fact by the trial judge, (pet. at 25) and held that there is liability "regardless of the existence of other legitimate motives and regardless of the district court's findings of fact that the same results would have occurred in any event." *Id.* at 29.

The Third Circuit decided that consideration of pension costs is a *per se* violation of § 510 if that consideration was "a determinative" factor in the employer's actions. This decision is premised on the type of analysis conducted by the Eighth Circuit in *Bibbs v. Block*, 778 F.2d 1318 (8th Cir. 1985), a race discrimination case. Any consideration of invidious racial discrimination which constitute "a determinative" factor in an employer's personnel actions should be proscribed because an employer has no legitimate interest in considering race. However, the history of American labor legislation such as ERISA represents an accommodation of the legitimate competing interests of employees, unions and management.

Legitimate business prerogatives are at issue here. Petitioners have not violated the Master and Pension Agreements or the National Labor Relations Act. Indeed, the National Labor Relations Act, the Age Discrimination in Employment Act and Title VII protect employers from discrimination claims for actions taken pursuant to the provisions of a bona fide seniority system. 29 U.S.C. § 623(f).

The Solicitor General's flawed assumptions and premises lead to the same erroneous legal conclusions contained in the Third Circuit's opinion. An independent review of the entire record by the Solicitor General including the findings of fact from the district court would have revealed the factual and legal conflicts created by the Third Circuit.

CONCLUSION

This Honorable Court should grant a writ of certiorari to resolve these important and recurring questions, to resolve the conflicts among the circuits, to set a uniform federal statute of limitations for ERISA § 510, and to resolve the conflict between the Third Circuit's "a determinative factor" test (*See* petition at 25, n.16) and this Court's "same decision" test as well as the important policy concerns at stake.

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